THE CONVEYANCER AND PROPERTY LAWYER

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CONVEYANCER'S NOTEBOOK

With this issue *The Conveyancer* begins its career as a bi-monthly periodical. It is not intended substantially to alter the character of the journal nor to increase the size of the volume for the year. It will enable cases and legislation and statutory instruments to be dealt with more quickly, but will still provide sufficient space for the more detailed articles which form part of our policy. We shall try to avoid splitting articles where that can be avoided. We hope that this course may render the periodical more useful.

Deposit of wills by living testators.—The following regulations have been issued by the Probate Registry for deposit by testators of their wills during their lifetime:—

In pursuance of the provisions of section 172 of the Supreme Court of Judicature (Consolidation) Act, 1925, the above Principal Probate Registry is the depository now provided for the wills of living persons, and testators may deposit their wills or codicils there, under the following regulations:—

1. *Deposit in person.* When the testator himself deposits his will or codicil, he will be required to sign his name, or acknowledge his signature, in the presence of a Registrar, to an endorsement on the envelop in which the will or codicil is enclosed, to the following effect:—

> "This Sealed Packet contains the Last Will and Testament (or Codicil to the Last Will and Testament, or Last Will and Testament and Codicil thereto) bearing date (respectively) (Here state the dates of all the papers enclosed) of me A. B., of, etc., whereof C. D., of, etc., and E. F., of, etc., are

appointed Executors, and the same is/are brought into the Principal Probate Registry of the High Court of Justice for safe custody, there to remain deposited until after my decease. I undertake to notify the said Executor(s) of the appointment as Executor(s) and of the deposit of the Will".

The residence of the testator and of the executors should be set forth in this endorsement, and also the date of the testator's signature thereto.

A minute setting forth the production of the packet containing the will or codicil, and when and by whom the same was produced, and the declaration of the testator that he deposited the same in the Registry for safe custody, and also acknowledging the receipt of the packet, will be drawn up in duplicate and will be signed by the Registrar. One copy of this minute will be delivered to the testator, and the other will be filed with the will in the Registry.

2. *Deposit by post or agent.* A sealed packet, similarly endorsed, received by post or by the hand of an agent, and accompanied by a signed request from the testator that the will or codicil be accepted for deposit, will be accepted. A formal minute will be sent by registered post to the testator, and, in the case of lodgment by an agent, an acknowledgment of receipt will also be given to the agent.

3. *Deposit through a District Probate Registry.* Wills for deposit will not be accepted by post at a District Probate Registry.

The testator may himself deposit his will (or codicil) at a District Registry for transmission to the Principal Registry. On production to the District Registrar of the sealed packet containing the will or codicil to be deposited, he will draw up a certificate in duplicate under his hand, setting forth when and by whom the same was produced to and left with him. He will deliver one of these certificates to the testator and retain the other in his District Registry, and he will transmit an office copy of the certificate, with the sealed packet, and a form of receipt to the Principal Registry. The receipt will be returned to him under the hand of one of the Registrars of the Principal Registry.

An agent may deposit a will or codicil for a testator at a District Registry. An acknowledgment of receipt will be given to the agent, and the District Registrar will forward the sealed packet and form of receipt and the testator's request for deposit by registered post to the Principal Registry. The Principal Registry will return the receipt to the District Registry and will send to the testator by registered post a formal minute.

4. *Opening a deposited will.* On the death of a testator who has deposited a will or codicil during his lifetime, the certificate of

death, and, when possible, the Registrar's minute or certificate on the deposit must be produced. The executors will be required to attend and acknowledge before one of the Registrars that they are the executors named in the will. They will be sworn to the will (which is not delivered up) before a Commissioner in the Registry. In appropriate cases a Registrar may direct (subject to such precautions as shall appear to him to be necessary, including the opening of the envelope and the preparation and retention of a photographic copy of the contents) that the will or codicil be sent to a District Probate Registry for the attendance of the executors, or, where he is satisfied that the attendance of the executors at a Probate Registry cannot reasonably be required, may authorise the production of the will or codicil at some other place by an officer of the Registry. The will or codicil once deposited will not *in any circumstances* be delivered out of the Registry, nor can it be revoked by destruction.

5. *Forms and envelopes.* The necessary forms and envelopes will be supplied by the Registry.

6. *Fees.* Fees taken shall be those provided by the Supreme Court (Non-Contentious Probate) Fees Order, 1950:—

		£	s.	d.
Fee No. 29	For depositing in the Principal Registry the will of a living person for safe custody (inclusive fee)	15	0	
	Further fee if the will is forwarded through a District Registry . . .	5	0	
On opening the will,				
Fee No. 52 (iii)	For minute under hand of a Registrar .	2	6	
	If search is necessary when the minute of deposit is not produced, Fee No. 30 .	1	0	
	If photographic copy is required, Fee No. 33, per foolscap sheet . . .	1	6	
	If an attendance by an officer is required, Fee No. 47	2	0	0
			(plus expenses)	

or such other fees as may from time to time be ordered.

VENDOR'S SOLICITORS' COSTS UNDER SECTION 82

By A. S. Wisdom, Solicitor

The liability of local authorities to pay vendor's solicitors' costs when acquiring land by agreement has been discussed at some length in previous articles (*The Conveyancer*, Vol. 13, pp. 9, 176). It is proposed here to consider this liability in the light of amendments made to the list of statutes specified in Schedule VII to the Local Government Act, 1933, by relevant enactments passed since 1948. Also to deal with the application of section 82 of the Lands Clauses Consolidation Act, 1845, in relation to compulsory purchase by local authorities. It should be noted from the outset that where section 82 is incorporated, or is deemed to be incorporated, with the statutory powers under which land is acquired, the local authority is bound to pay the vendor his solicitor's costs as provided by section 82.

Purchase by Agreement.

In the majority of cases the local authority will acquire land by agreement under Part VII of the Local Government Act, 1933 (sections 157 or 167), where the appropriate provisions of the Lands Clauses Acts are incorporated by virtue of section 176 of the Act of 1933, including section 82 of the Lands Clauses Consolidation Act, 1845.

However, a number of local government purchases are made in pursuance of Acts which expressly exclude the provisions of Part VII. These statutes are specified in section 179 (*b*) and (*g*) and Schedule VII to the Local Government Act, 1933, or later Acts replacing them. In such cases the incorporation or otherwise of section 82 may be summarised as follows :—

(i) Section 82 is expressly incorporated in respect of purchases made by agreement under any of these Acts—

Technical and Industrial Institutions Act, 1892 (by section 4 thereof).

Military Lands Acts, 1892–1903 (see section 2 of the Act of 1892).

Public Libraries Acts, 1892–1919 (section 12 (1) of the Act of 1892).

Development and Road Improvement Funds Act, 1909 (section 11 (4)).

Ancient Monuments Acts, 1913 and 1931 (section 1 (3) of the Act of 1913).

Town and Country Planning Act, 1947 (section 40 (2)).

Civil Aviation Act, 1949 (section 19 (5)).

(ii) Section 82 is *not* incorporated where purchases by agreement are effected under any of the following Acts—

Allotments Acts, 1908–1950 (see section 17 (1) of the Act of 1926).

Housing Acts, 1936–1949.

Agriculture Act, 1947, Part IV.

National Parks and Access to the Countryside Act, 1949.

Note.—The view has been expressed that where the Lands Clauses Acts are not expressly incorporated, they are deemed to be incorporated, without exception or variation, by virtue of section 1 of the Act of 1845. If this view is accepted, section 82 applies to voluntary purchases made under all the Acts contained in head (ii), save the Allotments Acts, 1908–1950. The position is, however, open to some doubt.

(iii) In the case of purchases under the Light Railways Acts, 1896 and 1912, the Order made by the Minister of Transport will determine whether section 82 is applied or not.

(iv) Many local authorities have obtained additional powers of purchase under local Acts containing a provision enabling land to be acquired by agreement " for or in connection with the purposes of any of the undertakings, powers or duties of the local authority, or for the benefit, improvement or development of the borough (or district) . . .". The local Act will determine whether section 82 is applied.

Vendors' solicitors should ensure, where necessary, that satisfactory provision for payment of their clients' costs is included in the contract or terms of agreement relating to a proposed sale of land to a local authority under any statute referred to under heads (ii), (iii) or (iv).

Compulsory Purchase.

In acquiring land compulsorily, local authorities must proceed as a general rule in accordance with the provisions of the Acquisition of Land (Authorisation Procedure) Act, 1946. The Lands Clauses Acts (with certain exceptions and modifications), including section 82, are incorporated by section 1 (3) and Schedule II, Part I to the Act of 1946. Cases in which the Act of 1946 is expressly excluded, or does not apply, are compulsory acquisitions under :—

(i) The Light Railways Acts, 1896 and 1912, where the application of section 82 depends upon the form of Order settled by the Minister of Transport.

(ii) Section 33 (8) of the Public Health Act, 1925, which incorporates section 82.

(iii) Part III of the Housing Act, 1936; here section 82 is *not* incorporated. But see the note to head (ii) under Purchase by Agreement.

(iv) Section 24 of the Water Act, 1945, where local authorities proceed in their capacity as statutory water undertakers. Section 82 is applied by Schedule II to that Act.

(v) Section 26 of the Water Act, 1945, where the Order made by the Minister of Health determines the incorporation of section 82 or otherwise.

(vi) Sections 9 and/or 23 of the Water Act, 1945, as amended by sections 2 and 3 of the Water Act, 1948. Section 82 is applied by the Schedule to the Act of 1948.

The Effect of Section 82

Section 82 provides that the costs of all conveyances of land acquired under statutory provisions incorporating the Lands Clauses Acts shall be borne by the acquiring authority, who is obliged to pay the costs of the vendor's solicitors relating to deduction of title and completing the conveyance on an item basis : *Re Burdekin*, [1895] 2 Ch. 36. Costs incurred prior to contract do not have to be paid, although in practice local authorities sometimes agree (although there appears to be no direct authority for this) to meet the vendor's legal expenses of the contract and to pay his solicitors' negotiating fee, often by way of a lump sum. Where the District Valuer negotiates a purchase on behalf of a local authority his provisional terms of compensation provide in common form that the acquiring authority shall pay " the claimant's proper legal costs of the transfer ", leaving ample scope for subsequent agreement as to costs to be arrived at between the parties.

Some local authorities have been in the practice of paying vendor's solicitors' costs where section 82 applies according to scale, despite the decision in *Re Burdekin* and various opinions advising (until recently) against this course. An opinion taken by the Law Society in 1948, however, advised that local authorities might in reasonable circumstances and in good faith make an agreement to pay the costs of the vendor's solicitors according to scale, without the agreement being *ultra vires* or the local authority becoming liable to surcharge under section 228 of the Local Government Act, 1933, or agree to pay a gross sum which might include any costs

of negotiation and of contract. These considerations apply whether the purchase is conducted under a compulsory purchase order or is effected by agreement backed by compulsory powers.

Where land is acquired under a purchase order which includes a direction for expedited purchase procedure under section 39 of the Town and Country Planning Act, 1947, the property will vest in the acquiring authority without a conveyance of the land being required. The question has sometimes been raised as to whether the authority is liable to pay costs in the absence of a conveyance. The answer would appear to boil down to a question of fact as to whether the vendor's solicitors have undertaken work within the meaning of section 82 which would enable the acquiring authority to verify the vendor's title in the usual way, but without a conveyance being executed. If so, they would be entitled to item costs as under section 82, but not otherwise, and the Law Society have of late expressed their view that local authorities should reimburse vendors accordingly. They would not be entitled to costs for any prior work in the absence of agreement to the contrary. It appears that the recent opinion of the Law Society regarding the validity of an agreement to pay scale charges or a gross sum does not apply to purchases under the expedited completion procedure.

In the case of registered land no difficulty arises, as costs will be paid in accordance with the Solicitors' Remuneration (Registered Land) Order, 1925, as amended by the Orders of 1936 and 1944. As regards any pre-contract costs, these may be payable by agreement.

COMPULSORY PURCHASE AND COVENANTS AFFECTING LAND

By Peter Brett, LL.B., Solicitor

It is nowadays, and has for many years been, the practice for a landowner who sells part of his land to impose covenants on the purchaser as to his use of the land sold. These covenants are usually intended to improve the enjoyment of the land retained, or enhance its value; they are sometimes purely restrictive, and sometimes of an affirmative nature.

The consequences of these arrangements, both as between the original parties and as between them and third parties who may become involved by reason of the sale or lease of the land thus subjected to the covenants, are now tolerably well settled; although the application of the legal principles to a specific transaction may present much difficulty, particularly as regards construction. As regards third parties, the decisions have been mainly concerned with private persons or corporations claiming under the original purchaser. However, where the third party is a person or corporation acquiring the land affected under statutory powers, special problems arise. It is with these problems that this article deals.

In order to deal with the matter as simply as possible, it will be convenient to assume that there is a piece of land subject to a covenant imposed on the occasion of its sale to the present owner; and that that owner now sells the land to a corporation acquiring it under statutory authority. It will also be convenient to assume that the covenant is a restrictive covenant, the benefit of which has been effectively annexed to land of the covenantee. We shall, however, notice at the appropriate places the differences which arise if the covenant is affirmative, or if it has not been annexed to the covenantee's land, so that it is a personal covenant. We shall also mention covenants contained in leases.

There are thus three parties involved—the acquiring authority, the covenantor, and the covenantee. We may consider the position of each in turn. In so doing, it should be borne in mind that the principles which will be examined apply not only where the acquiring authority takes the land after serving a notice to treat, but also in any case where they could have served such a notice, but have reached agreement without taking that step:

see *Kirby* v. *Harrogate School Board*, [1896] 1 Ch. 437. The principle of this case would apparently also apply wherever the acquiring authority has acquired land which could have been the subject of a compulsory purchase order, though none was in fact made; that is to say, wherever the acquisition is effected under statutory authority, whether general or specific.

The position of the acquiring authority is now well settled. No action will lie against them in respect of a breach of the covenant committed in the course of using the land under their statutory powers (*Kirby* v. *Harrogate School Board*, *supra*). The only remedy of the covenantee against them, if he has one, is to obtain compensation for injurious affection; we shall discuss this matter more fully when we consider the position of the covenantee. It should, however, be remembered that the covenantee will have an action if the breach alleged cannot be justified as being committed under the statutory authority: see *Clowes* v. *Staffordshire Potteries Waterworks Co.* (1872), L. R. 8 Ch. App. 125.

It appears, however, that the covenant is not extinguished, but merely suspended during the period of statutory user; hence if the acquiring authority sells the land, the covenant will revive and be enforceable against the purchaser (*Bird* v. *Eggleton* (1885), 29 Ch. D. 1012). This rule, however, requires certain qualifications. If the burden of the covenant runs with the land, the covenantee has an interest in the land, and the acquiring authority can, if they wish, purchase that interest under their compulsory powers; such a purchase would, of course, result in the extinguishment of the covenant (*Ellis* v. *Rogers* (1885), 29 Ch. D. 661). It would appear from this case—*per* Kay, J., at pp. 665–6—that the same result would occur if the acquiring authority paid to the covenantee compensation by way of injurious affection. Finally, if the alleged breach consists of the erection, construction or carrying out, or maintenance, of any building or work on land which has been acquired or appropriated by a local planning authority or highway authority under Part I of the Town and Country Planning Act, 1944, or acquired or appropriated by a local authority, or the Central Land Board, under Part IV of the Town and Country Planning Act, 1947, no action will lie even if it is committed by a successor in title of the acquiring or appropriating authority: see section 22 (1) of the 1944 Act (now amended by the 1947 Act and reprinted, in its amended form, in the Eleventh Schedule thereto). The person committing the breach is, however, liable to pay compensation to the covenantee, and if he fails to do so, the compensation is

recoverable from the acquiring or appropriating authority concerned : section 22 (2).

We may now consider the position of the covenantor. Of course, if the covenant is so framed as to exempt him from any liability after he has parted with the land, no question can arise. But where it is not so framed, his position is not entirely free from doubt. On principle, justice would seem to require that a conveyance to an acquiring authority acting under statutory powers should free him from all future liability; he cannot prevent the acquisition, and in the last resort the land can be taken from him without any act on his part. If he has conveyed the land before a notice to treat has been served, or a compulsory purchase order made, he has merely recognised, and bowed to, the inevitable.

The leading case on the matter is *Baily* v. *de Crespigny* (1869), L. R. 4 Q. B. 180. In that case the defendant had leased certain land to the plaintiff, and had covenanted in the lease that certain other land which he retained would not be used except for certain specified purposes. The defendant's covenant was " for himself his heirs and assigns ". Subsequently a railway company acting under statutory authority acquired the retained land from the defendant, who conveyed it to them after being served with a notice to treat. The company used the land in breach of the covenant, and thereupon the plaintiff sued the defendant upon the covenant. The action failed.

The judgment of the Court was delivered by Hannen, J., and there has been much controversy as to the *ratio decidendi*. The learned Judge, after stating the facts, said at p. 185 " We are of opinion that [the defendant] is discharged on the principle expressed in the maxim '*lex non cogit ad impossibilia*' ". He went on to explain this statement at some length, saying, at p. 186, that " the Legislature has created a new kind of assign such as was not in contemplation of the parties when the contract was entered into ".

It is this explanation that has given rise to the controversy mentioned above. We may say that there are two possible views as to *Baily* v. *de Crespigny*— (1) that it was a decision on the construction of the word " assigns " in the particular covenant (this we may call the narrow view), (2) that the acquisition under statutory authority was regarded as having, as it were, at least temporarily (*cf.* the remarks above as to the possible revival of the covenant against a subsequent purchaser) frustrated the covenant (this we may call the broad view). The narrow view is supported by certain *dicta* of Lord Buckmaster in *Matthey* v.

Curling, [1922] 2 A. C. 180, 228. His view, however, was apparently not shared by the Court of Appeal which had previously heard the case. The broad view is supported by *dicta* of Lord Finlay, L.C., and Lords Dunedin and Parmoor in *Metropolitan Water Board* v. *Dick, Kerr & Co., Ltd.*, [1918] A. C. 119, 126, 128, 140 : and of the Divisional Court in *Oppenheimer* v. *Minister of Transport*, [1942] 1 K. B. 242. The question very nearly arose for decision in *Walton Harvey, Ltd.* v. *Walker & Homfrays, Ltd.*, [1931] 1 Ch. 145, where Bennett, J., held that the narrow view was to be preferred. The Court of Appeal disagreed with him on this : [1931] 1 Ch. 274. Unfortunately, however, the case cannot be treated as a clear authority, because both Courts held that, in any event, there were special circumstances which precluded the defendants from relying on *Baily* v. *de Crespigny* (*supra*).

However, it seems clear that the weight of authority is in favour of the broad view, and it is accordingly submitted that the covenantor cannot be made liable for breaches of covenant committed by the acquiring authority. This leads to the question whether he can require them to indemnify him against any such breaches. Once more, we find that there is considerable doubt as to the answer.

The general position as between vendor and purchaser is that if the vendor will be liable for a breach of the covenant occurring after the conveyance to the purchaser, he can require the purchaser to indemnify him : *Re Poole and Clarke's Contract*, [1904] 2 Ch. 173, and cases there cited. Where the purchaser is an authority acting under statutory powers, there appears to be no decision directly in point; but it should be noted that, if a notice to treat has been served and the compensation payable ascertained, the acquiring authority can be compelled to accept a conveyance, the form of which will in case of disagreement be settled by the Court (*Re Cary-Elwes' Contract*, [1906] 2 Ch. 143). And in *Harding* v. *Metropolitan Railway Co.* (1872), L. R. 7 Ch. App. 154, the acquiring authority, who had agreed to purchase a leasehold interest and had paid the purchase money and been given possession, was ordered to accept an assignment and give covenants for indemnity. Lord Hatherley, L.C., said, at p. 159, " As to the abstract principle, I have no doubt that a company purchasing a leasehold interest as this company has done, is bound to take an assignment and bound to enter into an engagement to indemnify the vendor against the covenants of his lease. It would be a grievous injustice to take property by force from a man who was unwilling to dispose of it, and to leave him subject to a substantial

rent of £600 a year, and to the other covenants and conditions of his lease."

It is accordingly submitted that in the normal case the acquiring authority can be required to give a covenant for indemnity. Where the breaches are authorised by section 22 (1) of the Town and Country Planning Act, 1944 (*supra*), in either its original or its amended form, the covenantor will apparently no longer remain liable and cannot require an indemnity. But in other cases, it is suggested that the doubts already mentioned as to the effect of *Baily* v. *de Crespigny* (*supra*) are sufficient to prevent the acquiring authority from contending that the covenantor is relieved from liability; and that accordingly an indemnity should be given. This would be so whether the covenant is restrictive or affirmative, the decisive question being, not whether the burden of the covenant runs with the land, but whether the covenantor will remain liable thereon after the conveyance.

We come finally to the position of the covenantee. We have already seen that it is doubtful whether he can proceed against the covenantor, and that he can have no action against the acquiring authority for breaches committed under statutory authority. Is he then left without any remedy?

The answer to this question depends on the Act or Acts under which the acquiring authority purchased the land. If those Acts confer a right to compensation, the covenantee can recover it; if they do not, he has no remedy. It is accordingly essential in every case to know the statutory authority for the acquisition. However, as in most cases occurring to-day the Lands Clauses Consolidation Act, 1845, is incorporated either directly or indirectly, we can examine the position under that Act a little more closely.

It is now well settled that an owner of land which is injuriously affected by "the execution of the works" carried out by the acquiring authority can recover compensation under section 68 of the Act. His right to such compensation is, however, said to be limited by the following four conditions (see *Cripps on Compulsory Acquisition of Land*, 9th Edition, Vol. I, at p. 557):—

1. The damage or loss must result from an act made lawful by the statutory powers of the promoters [acquiring authority].

2. The damage or loss must be such as would have been actionable but for statutory powers.

3. The damage or loss must be an injury to lands, and not a personal injury or an injury to trade.

4. The damage or loss must be occasioned by the construction of the authorised works, and not by their user.

The amount of compensation payable will in case of dispute

usually be settled by the Lands Tribunal (Lands Tribunal Act, 1949, s. 1 (3) (*b*)).

The first three of the limiting conditions set out above need occasion us no difficulty. If the first is not satisfied, the covenantee will have a right of action, if the burden of the covenant runs with the land; if it does not, he may be able to recover indirectly by bringing an action against the covenantor, although, as we have seen, his success in such an action would depend on the view adopted as to the scope of *Baily* v. *de Crespigny* (*supra*). The curious situation might then arise that the liability of the acquiring authority will depend on the course adopted by the covenantor, who may choose either to rely on *Baily* v. *de Crespigny*, or to bring in the acquiring authority as a third party if he has obtained a covenant for indemnity. Hence, where the burden of a covenant does not run with the land acquired, the acquiring authority might be well advised to require the covenantor, as a condition of their giving him an indemnity, to raise such defences to an action for breach of covenant brought against him as they may request.

The second condition will of course always be satisfied where compensation for a breach of covenant is being sought, provided that the burden of the covenant runs with the land; the word "actionable" here seems to mean "the possible subject of a direct action against the acquiring authority". If the burden of the covenant does not run, the acquiring authority may well be immune from liability under section 68, but as we have just mentioned may find themselves indirectly liable to compensate the covenantee.

The third condition requires that the benefit of the covenant shall be annexed to the covenantee's land. If it is not so annexed, *i.e.*, is a merely personal covenant, he cannot claim compensation.

The fourth condition gives rise to certain problems, which we may illustrate by the case of *Long Eaton Recreation Grounds Co.* v. *Midland Railway* (1901), 71 L. J. K. B. 74; on appeal, [1902] 2 K. B. 574. This case is, by the way, clear authority that a breach of a restrictive covenant by the acquiring authority will, if not actionable, ground a claim to compensation for injurious affection. The Long Eaton company were entitled to the benefit of certain covenants restricting the use of land acquired by the railway company. There were three covenants, two of which prohibited building on the land, and the third of which restricted the use of it to certain specified purposes. All three covenants were broken by the railway company in the exercise of their statutory powers, and it was held that compensation for injurious affection was recoverable. The problem which we have to consider is whether

it would have been recoverable if only the third covenant had been broken.

The proposition that mere use, as distinct from the carrying out of some kind of constructional work, will not be sufficient to afford a basis for the recovery of compensation is derived from *Hammersmith and City Railway Co.* v. *Brand* (1868), L. R. 4 H. L. 171. In that case compensation was claimed on the ground that certain lands were injuriously affected by vibration, etc., caused by the running of the railway. It was admitted that the acts complained of would have amounted to an actionable nuisance unless authorised, as they were held to be, by statute. The first three of our limiting conditions were thus satisfied. The House of Lords took the advice of the Judges, and held, against that advice, by a majority of two to one, that compensation was not recoverable.

The decision was based on section 6 of the Railways Clauses Consolidation Act, 1845, which provided that the railway company should compensate owners of lands injuriously affected by the construction of the railway. It was held that the acts complained of arose out of the use of the railway, and not out of its construction, thus limiting the word "construction" to the physical acts of laying the lines. Lord Cairns, L.C., vigorously dissented from the decision, and of the eleven judges who gave their opinions at various stages of the action, seven were in favour of giving compensation and four against.

As we have mentioned, most claims for compensation for injurious affection will nowadays fall to be decided under section 68 of the Lands Clauses Consolidation Act, 1845, which refers to lands injuriously affected by the "execution of the works"—that is, the works authorised to be executed by the special Act or compulsory purchase order under which the acquisition takes place. Does the principle of *Brand's Case* govern such claims? There are conflicting opinions as to this.

In *Cowper Essex* v. *Acton Local Board* (1889), 14 App. Cas. 153, Lord Halsbury, L.C., and Lord Watson clearly thought that *Brand's Case* was of general authority. Their opinions were, however, purely *obiter*, as the case with which they were dealing was governed by section 63 of the Lands Clauses Act. We may also notice that in *Brand's Case* Lord Cairns, L.C., thought that there was no difference between "construction of the works" and "execution of the works". On the other hand, Lords Chelmsford and Colonsay preferred to rest their majority opinions solely on the meaning of the phrase "construction of the works".

The question was again raised in *Fletcher* v. *Birkenhead Corporation*, [1907] 1 K. B. 205. The Court of Appeal there held that

Brand's Case determined no question of principle, and merely dealt with the construction of a particular Act. They accordingly allowed the claimant to recover compensation for acts committed in the course of mere user, holding that the relevant statutory provision—the Waterworks Clauses Act, 1847, which refers to the construction *and maintenance* of the works—was worded widely enough to admit such a claim.

In the *Long Eaton Case* (*supra*), Lawrance, J., thought that *Brand's Case* had no application to a claim based on the breach of a restrictive covenant. He thought that the covenantee was in a special class of persons (by virtue of the covenant), and that this class was not considered in *Brand's Case*. The Court of Appeal upheld his decision on other grounds, without referring to this point. It is respectfully submitted that the distinction made by the learned Judge is not relevant; he based it on certain observations made by the majority members in *Brand's Case* as to the reasons why the Legislature had thought fit to limit claims in the way it was decided that they had. The policy of the Act only becomes relevant if there is an ambiguity to be resolved, and Lords Chelmsford and Colonsay found no ambiguity in the words they had to construe.

The point arose directly for decision in *Re Simeon and Isle of Wight R. D. C.*, [1937] Ch. 525. Compensation for injurious affection was claimed in respect of acts committed in the course of using a waterworks; the only relevant section was section 68 of the Lands Clauses Act. Luxmoore, J., held that compensation was recoverable. He held that the matter was governed by the decision in *Fletcher* v. *Birkenhead Corporation* (*supra*); this was hardly accurate, as the Waterworks Clauses Act, 1847, did not apply. However, the learned Judge also held that *Brand's Case* (*supra*) was distinguishable on the grounds that the phrase "execution of the works" is wider than "construction of the works", and "includes the exercise, that is the carrying out and the execution, of the appropriate statutory powers".

It will thus be seen that there is some doubt whether the fourth of our limiting conditions really exists. Despite *obiter dicta* of some weight to the contrary, it is submitted that the question is as yet unresolved, and that if the matter should ever come before the House of Lords the way is open for them to declare that there is no general principle precluding the recovery of compensation for acts committed in the course of mere user. We should also notice that if a claim for compensation can be ostensibly based on the execution of "works", it is probable that the compensation awarded will be allowed to include damage or loss which will result

from the subsequent user of those " works ". In the *Cowper Essex Case* (*supra*), Lord Macnaghten observed that the tribunal might take into consideration the consequences likely to result from the execution of the works on the lands required, and need not " make believe that the intended works are some innocent and meaningless folly ".

We may now summarise the results of our investigation as follows:—

A. If the benefit and burden of the covenant run with the respective lands of the covenantee and covenantor—

(1) an action will lie against the acquiring authority where the alleged breach is not committed in the proper exercise of statutory powers;

(2) if the breach is committed in the proper exercise of statutory powers, the covenantee will be able to claim compensation from the acquiring authority under section 68 of the Lands Clauses Consolidation Act, 1845,—assuming that Act applies —unless (perhaps) the breach is committed solely in the course of using the land as opposed to executing works thereon;

(3) the covenantor is (probably) relieved from liability by the acquisition;

(4) unless compensation has been paid or the interest of the covenantee extinguished, the covenant will revive on a sale by the acquiring authority as against their successors in title, save in the cases covered by section 22 (1) of the Town and Country Planning Act, 1944;

(5) the covenantor can (probably) require the acquiring authority to give him an indemnity.

B. Where the benefit, but not the burden, of the covenant runs—

(1) the covenantor is (probably) relieved from liability by the acquisition;

(2) the covenantor can (probably) require the acquiring authority to give him an indemnity;

(3) the acquiring authority can only be made liable indirectly by way of the indemnity, and should accordingly limit it in the manner suggested.

C. Where neither the benefit nor the burden of the covenant run, the position of the covenantor and covenantee is, of course, not changed by the acquisition.

Finally, we may notice that the principles of A apply where the acquisition is of an existing term of years, or of the reversion on a lease. The case of *Manchester, Sheffield and Lincolnshire Ry. v. Anderson*, [1898] 2 Ch. 394, affords an example.

APPORTIONMENT OF RENT

By E. O. Walford, LL.D.

Some fifty years ago the Council of the Law Society was invited to express an opinion concerning the method of apportionment to be adopted in respect of the current quarter's rents upon the completion of a sale. The premises were let at yearly rents, payable by four equal quarterly instalments on the usual quarter days. The quarter in respect of which the apportionment had to be made was the quarter from Michaelmas to Christmas, which comprises eighty-seven days only. It was found that if the quarter's rent were divided by eighty-seven the daily rate was £2 3s. 6d.; but if a full year's rent were divided by 365 the daily rate would be £2 1s. 5d. The Council decided that the appropriate course was to take into account only the current quarter of eighty-seven days. As the vendor was entitled to the rent for sixty-three days the result was that he should receive sixty-three eighty-sevenths of the quarter's rent, and not sixty-three three hundred and sixty-fifths of one year's rent: Opinion of the Law Society, January 11, 1900. Subsequently a case was put to the Council for its opinion where the conditions did not refer to the current quarter's rent, nor (so far as appears from the *Law Society's Digest*, 1937) was there any condition concerning apportionment of rent. It appears only to have been stated that the vendor would pay the outgoings up to the date fixed for completion, and that the purchaser would bear them as from that date. The current quarter contained ninety-seven days of which ninety-four days had expired by the date fixed for completion. The Council again decided that the apportionment should be made in accordance with the actual number of days in the quarter, with the result that the vendor would be entitled to ninety-four ninety-sevenths of the quarter's rent and the purchaser would receive the remaining three ninety-sevenths.

In the course of some thirty years or so I have heard the view expressed many times that the Law Society's opinion is not justifiable, the argument to that effect being based generally upon the view that where a yearly rent is reserved any apportionment of rent should be made by reference to a full year and not to a particular quarter. The object of this article is to point out that there would appear to be strong grounds for thinking that the opinion of the Council of the Law Society is correct.

APPORTIONMENT ACT, 1870

It is provided by section 2 of the Apportionment Act, 1870, that all rents, annuities, dividends and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise) shall, like interest on money lent, be considered as accruing due from day to day and shall be apportionable in respect of time accordingly.

The word " rents " is not defined by the Act but it is declared by section 5 of the Act that that word " includes rent service, rent-charge, and rent seck, and also tithes and all periodical payments or renderings in lieu of or in the nature of rent or tithe ".

It is possible to argue that as rent includes " periodical payments . . . in the nature of rent ", quarterly or other periodical payments of rent are within the words last quoted, and that the apportionment " from day to day " must be made in respect of each particular quarter or other period, and not in respect of a full year; but it is not clear that " periodical payments in the nature of rent " are equivalent to " periodical payments of rent " or " periodical payments of instalments of rent ". Section 2 of the Act refers (see above) to rents, annuities, dividends and other periodical payments in the nature of income. There the words periodical payments clearly have no reference to rents: they must be *other* periodical payments. It seems, therefore, that we are left with the proposition that all rents . . . shall be apportionable in respect of time, and that they are to be deemed to accrue from day to day subject to any stipulation to the contrary : see section 7 of the Act.

WHEN IS APPORTIONED PART PAYABLE

If no more were said by the Act or by the document reserving the rent an apportioned part of the rent could be recovered each day. That point is covered by section 3 of the Act, which enacts that the apportioned part of any such rent is to be payable or recoverable when the entire portion of which such apportioned part shall form part, shall become due and payable, and in the case of a rent determined by re-entry, death or otherwise when the next entire portion of the same would have been payable if the same had not so determined. Thus the person entitled to an apportioned part of the rent must wait until the " entire portion " would have been due, even if by reason of forfeiture of the lease or otherwise no rent is payable beyond (say) a day or two after the last preceding date for payment of the " entire portion ". It is not necessary at this stage to consider section 4 of the Act, which provides for recovery

of the due apportioned part of the rent with a proviso as to rents reserved in certain cases, except to notice that the term " entire portions " again occurs in that section in relation to remedies " for recovering such entire portions ".

Earlier Statutes

We have seen that the apportioned part of any rent is payable when the entire portion of which the apportioned part forms part becomes payable (section 3, *supra*); but the Act throws no light on the meaning of the entire portion. If a yearly rent were payable annually the entire portion would no doubt be the full year's rent, though the word " portion " sounds strange in such a connection. It seems probable that that word must have been employed in order to cover cases in which a yearly rent was payable by instalments. Can any support be found for that view? Although the doctrine is to be applied with caution and does not apply where the meaning of the subsequent Act is quite clear, it would seem that where the meaning of a word or phrase in a statute is doubtful, it is permissible to call in aid an earlier statute dealing with the same subject-matter and disclosing the meaning which the Legislature attached to that word or phrase in the earlier statute : *Dore* v. *Gray* (1788), 2 T. R. 358; and see *per* Fletcher Moulton, L.J., in *Macmillan* v. *Dent*, [1907] 1 Ch., at p. 120.

Distress for Rent Act, 1737

To understand the background in relation to the Apportionment Act, 1870, it is necessary to appreciate the fact that at common law neither rents nor annuities and other payments due at fixed periods were apportionable, so that in the case of a lease which determined before one of the periods had expired, the landlord could recover nothing in respect of the current period. To some extent that defect was adjusted by the Distress for Rent Act, 1737, which provided that where any tenant for life died before or on the day on which any rent was reserved or made payable to him under a lease which determined on the death of the tenant for life, his executors or administrators should have an action on the case against the tenant for the whole of the rent if the tenant for life died on the day on which the rent was made payable, or if he died before that date then for a proportion of such rent according to the time the tenant for life lived of the last year or quarter of a year or other time in which the said rent was growing due, making all just allowances.

Pausing at this stage, it is desired to emphasise the fact that the

word rent in the statute last mentioned was clearly used as relating to rent for a period which was not necessarily a year. It is quite true that a tenancy might be created on the footing that the rent was to be paid monthly, or quarterly, or at some other stated period and the rate might be specified in relation to the month or quarter or other period, without any reference whatever to the annual rate. In such cases no doubt each quarter would stand on its own footing for all purposes, so that the Law Society's ruling concerning apportionment would probably be acceptable to all. In other cases the rent might be reserved as a yearly rent to be paid "quarterly" or "by quarterly instalments" on specified days. The Distress for Rent Act, 1737, when referring to the day on which any rent was reserved or made payable could not have been referring to the year for which a yearly rent was reserved, except in a case where the rent was payable yearly, as obviously the day on which any rent was reserved or made payable must, in all other cases, be the quarter day, the day of the month or week or other day on which rent was payable. Hence the term rent was clearly applied in that Act to periodical payments. If a yearly rent were reserved and made payable by (say) quarterly instalments on the usual quarter days it is clear that the Act did not contemplate that there could be any apportionment in respect of a full year, but only in respect of "the last . . . quarter of a year . . . in which the said rent was growing due". Strictly in such a case unless the tenant was in arrear, a *year's* rent would never be payable.

APPORTIONMENT ACT, 1834

Whilst the mischief which the Act of 1737 was intended to set right clearly extended to all cases where leases determined on the death of the lessor, although he might not be strictly a "tenant for life" it was doubtful whether the Act did extend to such cases. Accordingly, an Act entitled the Apportionment Act, 1834, was passed to extend the same rule to cases of the last mentioned type (see section 1 of that Act); but it was necessary that the letting should be made in writing in order that the Act should apply. Moreover, for some curious reason or by oversight no similar relief was given by the Act of 1834 in relation to cases where a freeholder was the landlord and died after devising the land by his will, or died intestate. In neither case could the devisee or heir recover a proportion of the current periodical payment of rent, though these defects were made good by the wider terms of the Act of 1870 (*supra*).

The marginal note to section 2 of the Act of 1834 is "All rents, annuities and other payments coming due at fixed periods shall be

apportioned ". Probably that note states too widely the effect of the section to which it relates; but in view of the wider effect of the Act of 1870 it is not necessary to discuss the provisions of section 2 of the Act of 1834 except for the purpose of considering the sense in which the words " entire portion " were employed in that section. The material portion of the section provides that rents payable or coming due *at fixed periods* under any instrument executed after the passing of the Act shall be so apportioned that on the death or other determination of the interest in such rents of any person, he or his executors or administrators or assigns shall be entitled to a proportion of such rents " according to the time which shall have elapsed from the commencement [*i.e.*, of the rents] or last period of payment thereof respectively (as the case may be) " including the day of such death or determination as above mentioned, with further provisions as to remedies for recovery of " such apportioned parts of the said rents . . . when the entire portion of which such apportioned parts shall form part shall become due and payable "— in other words, when the current yearly, quarterly, monthly, weekly, or other payment of rent is due to be made. Those remedies are declared by the section to be the same as the lessor, his executors or administrators would have had for recovering " such entire rents " if entitled thereto, but without permitting direct claims against the tenant, for the apportioned part of the rent. The " entire rents of which such portions shall form a part " are, in effect, to be paid by the tenant as if the Act had not been passed, and it is finally provided by the section that " such portions " are to be recoverable from the persons receiving the entire rents.

It is extremely difficult to deduce anything useful concerning the use of the word " portions " in the last-mentioned passage. In the earlier words of the Act the words " entire portions " are apparently used to refer to the full quarterly or other periodical payments of rent, but the provisions as to apportionment refer to " a proportion of such rents " and not to a proportion of " entire portions ". Again, after the provision that the tenant is not to be required to pay the " apportioned parts ", but is to continue to pay the entire rent as before, one would have expected to find a provision that the " apportioned parts " should be recoverable from the persons recovering the " entire portions " or possibly the " entire rent ". Instead of such a provision the section provides, as above indicated, that such *portions* are to be recoverable from the person(s) receiving the entire rent.

On balance it seems fair to assume that the " entire portions " are the full quarterly or other periodical payments due under the

lease, as it does not appear to be possible to suggest any alternative interpretation which produces a reasonable result. As no persons are entitled to any " portions " under the Act, but only to " apportioned parts " the concluding words of the section which state that " such portions shall be recoverable from the person who would have been entitled to the entire rents if the Act had not been passed " are almost incomprehensible. It may be that for the words " such portions " one should read " such apportioned parts ". That view appears to be reflected in section 4 of the Apportionment Act, 1870, which, after providing that the " entire or continuing rent " is to be " recovered and received as if the rent had not been apportionable under the Act ", enacts that the *apportioned part* receivable in accordance with the Act shall be recoverable from the person entitled to receive the entire or continuing rent. As that provision substantially supersedes the Act of 1834, it is not necessary to speculate further concerning the closing provisions of section 2 of the last-mentioned Act.

Entire Portions

The meaning of the words " entire portions " under the legislation above summarised seems reasonably clear. No intelligible and practical interpretation of the Act seems to be possible except upon the basis that where a rent at a certain rate is reserved, be it yearly or otherwise, and such rent is made payable by instalments at certain dates, those payments are the " entire portions " referred to in the Acts. There is, however, no provision in the Acts for the apportionment of " portions " of rent, but only for the apportionment of " rents ". There is no definition, strictly so called, of the word " rents " in the Act of 1870, but only a statement that " rents " includes rent service, rentcharge and rent seck and also tithes and all periodical payments or renderings in lieu of or in the nature of rent or tithe. It will be seen that the words " periodical payments " cannot refer to rents proper.

If we look back to the provisions of the Distress for Rent Act, 1737 (*supra*) it will, however, be seen that provision was made for recovery by the personal representatives of tenants for life who died before the day on which any rent was payable of " a proportion of such rent according to the time such tenant for life lived of the last year or quarter of a year or *other time in which the said rent was growing due* ". Now in the case of a yearly rent payable at stated days or periods it may be said that no question of apportionment *can* arise except in respect of the periodical payment of instalments, and that a full year's rent as such never does fall due under the terms of the tenancy, though a tenant may, of course,

be several quarters in arrear with his rent. It may therefore be said that the apportionment contemplated by the Act of 1737 was an apportionment in respect of the current quarter or other period for payment of rent according to the number of days during that period for which the tenant for life was living. Even that analysis of the position does not conclusively establish the fact that the rate per day was not to be calculated according to the actual number of days in a year where a yearly rate was specified, but payments were to be made by quarterly instalments on certain days. Suppose, however, that such a test was taken in a case where the quarterly payments were to be made on the usual quarter days, peculiar results would ensue.

Argument Ab Inconvenienti

The following examples show how such a test would work. Rent is reserved by a lease at the rate of £365 per year payable by equal quarterly payments of £91 5s. 0d. on the usual quarter days. A case arises in which X, the person entitled to the rent for life, dies on September 28, and apportionment is necessary. The quarter from June 24 to September 29 contains ninety-seven days. The quarterly instalments of rent amount to £91 5s. 0d. If X is entitled to ninety-six ninety-sevenths of £91 5s. 0d. the result is not abnormal. If, however, apportionment is to be made on the basis of £365 per year, *i.e.*, £1 per day, X must receive £96, which is £4 15s. 0d. more than the amount payable on September 29. In other words in such a case X will not merely be entitled to the full quarter's rent, but will also be entitled to collect a proportion of the next instalment payable on December 25. Moreover, if that method of calculation is correct, then if X dies on, say, September 29, he will be entitled only to the instalment payable on September 29, *i.e.*, £91 5s. 0d. according to the express enactment to that effect in the Act of 1834 (*supra*), so that by dying one day *later* he will be entitled to less than he would have received if he had died on September 28. The mere fact that an inequitable result will flow from legislative provisions which are unambiguous is no ground for distorting the clear words of the statute, but in the present case the wording is ambiguous, and whatever may be said as to the absence of any provision specifically relating the apportionment to the number of days in each quarter or other period for payment of the instalments of rent, the mischief at which each of the Acts above-mentioned is aimed, is the death of someone, or the determination of the term, before some particular date on which the periodical payment of rent is to be made, and it could never have been contemplated when it was enacted that a person dying on the

quarter day or other day for payment of rent should receive the whole of the rent payable on that quarter day or other day for payment of rent that such a person should receive more than the last-mentioned rent if he died *before* the date for payment of rent.

Again, where a yearly rent is reserved and is made payable by calendar monthly payments on a certain day of the month, it is obvious that the calendar months differ in length. All schoolboys and schoolgirls know the jingle which commences "30 days, etc." or do they? Is it "30 days hath September?" or "30 days hath November?" (*a*).

Despite the possibility that a particular month may comprise 28, 29, 30 or 31 days it is the common understanding of both landlord and tenant that each calendar monthly payment of rent on the due date discharges the tenant's liability for rent for the calendar month expiring on that day (*b*), and does not cover his liability for the number of days which have elapsed since the last day for payment of rent, calculated at the rate of 1/365th part of a full year's rent.

One more reason may be given to support the view that apportionment should be made on the footing that the "proportion" to be considered in relation to apportionments is the proportion which the number of days in respect of which the apportionment is to be made bears to the total number of days in the current quarter, month, week, or other current period, where a yearly rent is payable by fixed and equal instalments quarterly, monthly, weekly or at other regular intervals.

The Act of 1834 provides, within the limits of its application, for the apportionment of all rents . . . "made payable or coming due at fixed periods" (see section 2). Those words must refer to quarterly, monthly, weekly or other periodical payments of rent even if a yearly rate is specified in the lease. That being so, it is submitted that it must be the particular current quarter, month, week or other current period which must be considered in order to determine the total number of days against which one is to set "the time which shall have elapsed from the commencement or last period of payment" of the rent in order to determine in accordance with section 2 of the Act the proportion of the rent for the current quarter or other "period of payment" which is to be

(*a*) In point of fact, the Nursery Rhyme version begins: "30 days hath September". The other version from the *Abridgement of the Chronicles of England* (1570), by Richard Grafton, begins "30 days hath *November*".

(*b*) The reference here is not necessarily to the end of the month, but to the day of the month on which monthly instalments are payable: *e.g.*, a payment on February 10 may cover the period from the expiry of January 10 to the expiry of February 10.

received by the person whose interest has ceased during any such quarter or other period. The Act of 1870 already referred to in some detail does not contain quite the same wording; but section 2 of that Act does provide for the apportionment of "rents . . . and other periodical payments" thus classifying the rents to which the section applies as rents payable periodically. If a rent is payable by quarterly instalments a full year's rent *as such* is never payable, so that the rents to be apportioned must be those payable quarterly, and such rents are by the terms of section 2 of the Act of 1870 to be treated as "accruing due from day to day" and are to be "apportionable in respect of time accordingly". If it is correct to assume, as I think it must be, that the apportionment must be related to the length of the quarter in question, for the reasons already given, then the opinion of the Law Society mentioned in the opening portion of this article is correct.

It can be established that the provisions of the Acts of 1737, 1834 and 1870 represent successive stages in the process of rendering apportionable rents and other periodical payments, but the reference in the Act of 1870 to "entire portions" in the phrase "the entire portion of which such apportioned part forms part" following the reference to "the apportioned part of any such rent" is certainly confusing as it appears to distinguish between "rent" and a "portion" of rent, the "apportioned part" being referred to the rent; and the provisions of section 4 of the Act also refer to "any such apportioned part form part of an entire or continuing rent", and not to "any such apportioned part of an entire portion". The wording of section 4 fits in with the provision in section 2 of the Act that "rents" (and not "portions of rent") are to be apportionable.

The whole difficulty is that whilst the series of statutes dealing with apportionment show clearly that the number of days during which a tenant for life lives, or during which the term is in force, is to be taken into account in order to determine the appropriate apportioned part, none of the Acts affords any guidance as to the total period to which regard is to be had in the case of a yearly rent payable by quarterly or other instalments. If it were the practice, when providing for the payment by quarterly instalments, to state in the lease or tenancy agreement that each quarterly instalment shall be paid and taken in satisfaction of the rent payable for that quarter, all difficulties in relation to the yearly rate would disappear. An even simpler way in which such difficulties could be overcome would be to omit all reference to the yearly rate and to provide for the yielding and paying to the landlord of the quarterly rent of £—— on each of the usual quarter days [*or as*

the case may require] commencing on the —— day of ——. It is submitted, however, that the understanding of both landlord and tenant in relation to case where rent at a yearly rate is made payable by quarterly instalments on certain days is that each payment relates to the quarter in question and not to any longer or shorter period, whatever the actual number of days in that quarter. That understanding is borne out by the fact that where there is a provision for the determination of a tenancy, say, upon any of the usual quarter days, it is never contended by the landlord or tenant, or his solicitor, that an additional amount or a smaller amount is payable by reason of the fact that the quarter to which the notice of determination relates contains more or less than one-fourth of the number of days in a year.

It is conceded that none of the reasons given in this article for the view that the opinions of the Council of the Law Society are correct is conclusive; but in my opinion there is no doubt that the Courts would find so little to support the contrary view, that they would be constrained to adopt the commonsense view of the Law Society, supported as it is by the normal practice of landlord and tenant and of their legal advisers. Whilst the opinions of the Law Society did not relate to cases in which a yearly rent is payable by calendar monthly instalments it is submitted that when an apportionment of rent is required in connection with such a tenancy the same principle applies with the substitution of the number of days in the relevant month for the number of days in the relevant quarter.

As apportionments have often to be made as between tenant for life and remainderman it is well to bear in mind the fact that the provisions of the Distress for Rent Act, 1737, and the Apportionment Act, 1834, still remain in force. Although the Act of 1870 is in such wide terms as practically to supersede the earlier Acts it did not repeal them. In fact the difficulty in interpreting some of the provisions of the Act of 1870 probably results from a partial adoption of the terms used in the Act of 1834.

It has been said that the Court will lean towards giving to the language of a statute a reasonable effect, and one which is consistent with the ordinary practice of the country (*Re Insole's Settled Estate*, [1938] Ch. 812), and in *Altrincham Electric Supply Co.* v. *Sale Urban District Council* (1936), 154 L. T. 379, Lord Macmillan said: "I do not doubt that, if the language of a statute is ambiguous and susceptible of two meanings, one of which is consonant with justice and good sense, while the other would lead to extravagant results, a Court of law will incline to adopt the former and reject the latter, even although the latter may

correspond more closely with the literal meaning of the words employed ". It is submitted that the illustrations given in the section of this article which is headed " Argument ab inconvenienti " afford good ground for thinking that the view of the Council of the Law Society would be upheld by the Courts.

MUTUAL WILLS

By G. Boughen Graham, LL.B., Barrister-at-Law

It may happen that two persons, usually, but not necessarily, husband and wife, are found to have made simultaneous wills and the question may arise whether any rights or obligations are thereby created and if created their extent and nature. The two questions of the existence of the rights and the extent of the rights may conveniently be treated separately.

The Existence or Non-existence of Rights

Firstly, the fact of the wills being made simultaneously does not of itself create any rights or obligations. Indeed, it is possible, although perhaps unlikely, that the simultaneity of the wills is purely coincidental. Secondly, however, the wills may have been executed in pursuance of an agreement between the testators and if this is so rights may accrue, not from the wills themselves but from that agreement. Whether such is the case depends entirely on the terms of that agreement. Thirdly, such agreement need not be express but may be inferred or implied from the conduct of the parties, such conduct will, of course, include the circumstances in which the wills were made and the terms of the wills themselves.

Therefore the only question of difficulty going to the existence or non-existence of rights is the question in what circumstances such an agreement may be implied and to what extent evidence extraneous to the wills themselves may be considered. Unfortunately the authorities on the point are not very helpful, which is not altogether surprising since the matter must depend on the facts of each case.

The earliest and the leading case is *Dufour* v. *Periera*, 1 Dick. 419; 2 Hargr. Jur. Arg. 304, in which a husband and his wife, who had power to bequeath personalty secured to her separate use, made a joint will whereby the residuary estate was pooled into a common fund and bequeathed to the survivor for life with gifts over. Lord Campden said (2 H. J. A., p. 310): " . . . the instrument itself is the evidence of the agreement ", but as Astbury, J., pointed out in *Re Oldham*, [1925] 1 Ch. 75, at p. 85: " . . . that is all based on Lord Campden's finding of fact that a certain and

unequivocal trust was agreed to and created by the two parties who executed this mutual will. It is true that he came to the conclusion from the contents of the document itself but nevertheless he bases his judgment on the fact that such an agreement was actually come to ".

The precise grounds upon which Lord Campden found his facts are not stated but it will be observed that he was dealing with one joint will in which the residuary estate was pooled.

In the complicated case of *Lord Walpole* v. *Lord Orford*, 3 Ves. Jun. 412, at p. 420, Loughborough, L.C., points out that " . . . for the Court to execute an agreement it is always necessary that the terms should be clear. Here it is uncertain whether they meant it as a legal obligation ". The difficulty in every case is to decide whether the parties did intend to create legal obligations.

Stone v. *Hoskins*, [1905] P. 194, was a case in which husband and wife made mutual wills, and it is stated in the report that the evidence showed that there had been an agreement or arrangement between the testators to leave their entire estates to each other and that the wills should be irrevocable. It is not stated, however, from what evidence this conclusion was drawn.

In the Goods of Heys, [1914] P. 193, was a similar case in which husband and wife each left his or her estate to the other in the event of the other surviving, with alternative gifts in the event of lapse. There was the additional fact that in the case of both testators the whole estate, or almost the whole estate, consisted of house property which they held as joint tenants, and Sir S. Evans, P., held on these facts, without elaborating his reasons, that there had been an agreement that the wills should be irrevocable.

The most helpful case in the reports is *Re Oldham* (*supra*) where husband and wife made wills in which, apart from some trifling legacies, each gave his or her property to the other absolutely with similar provisions in each will in the event of lapse. Considerable evidence was adduced of the circumstances leading up to the execution of the wills and it was argued on the one side that no agreement or arrangement need be proved outside the form of the wills and on the other side that there was no, or insufficient, evidence of such an agreement. Astbury, J., at p. 88 said : " . . . the fact that the two wills were made in identical terms does not necesarily connote any agreement beyond that of so making them . . . there is no evidence . . . that there was an agreement that the trust in the mutual wills should in all cases be irrevocable by the survivor who took the benefit . . . I have no means of deciding

with certainty what, among many possible inferences, is the sole inference that ought to be drawn from the circumstances ".

These views of Astbury, J., were commented on with approval by Lord Haldane in *Gray* v. *Perpetual Trustee Co., Ltd.*, [1928] A. C. 391, at p. 400. This was another similar case except that the gifts between the spouses were for life with gifts over and there had been considerable conflict of judicial views in lower Courts as to whether, on the facts, there had been an agreement and Harvey, J. (of the Supreme Court of New South Wales) had propounded the view that although no binding contract was proved yet where mutual wills were made by two persons as a result of some understanding or agreement between them it was enough, although such understanding did not amount to a binding contract in law, to give rise to equities. This view was rejected by Lord Haldane who stated that without evidence of a definite contract there could be no more right to a trust in equity than to damages at law.

Re Hagger, [1930] 2 Ch. 190, was, like *Dufour* v. *Periera* (*supra*), a case not of two wills but of one joint will by husband and wife which recited that they had devoted their joint energies to business, and had thus acquired property and had agreed to dispose of that property by their joint will which should not be revoked or altered save by mutual agreement and in the light of such recitals Clauson, J., had little difficulty in deciding that there was an agreement not to revoke.

Finally, in *Re Green*, [1950] 2 All E. R. 914, there were two mutual wills of husband and wife each reciting that if the survivor of them had the use of the other's property during his or her life he or she would provide in his or her will for the carrying out of the wishes of the other, and Vaisey, J., had little difficulty in following *Re Hagger* (*supra*) to find in these recitals evidence of an agreement not to revoke.

All that can be gathered from these cases is that the Court must be satisfied from all the facts before it that when the wills were made they were made pursuant to a contract, one term of which was that neither will would be revoked without the consent and agreement of the other party. If such a contract is found then rights and duties may arise thereout : if no such contract is found then the fact that the wills were executed contemporaneously and provided for mutual bequests is of no significance.

It follows that, if the draughtsman wishes to draw mutual wills which shall be irrevocable without the consent of the other party, it is well that he should make it plain in the wills that they are drawn pursuant to such a contract. Thus each will might well

commence : " This is the last will, etc., of, etc., which I make in pursuance of a contract entered into this day between myself of the one part and —— of the other part whereby it was agreed between us that in consideration of the said —— executing a will of even date with these presents in terms approved by me and in consideration of the said —— agreeing not to revoke his said will I would execute these presents and would not revoke them without the consent of the said ——".

On the other hand, if it is desired to make simultaneous wills which, whilst complementary in terms, are not intended to be irrevocable without consent, each will might well include a clause in similar terms to the following : " I declare that this my will is not made in reliance upon —— making or intending to make a will in my favour and I further declare that it is not agreed between me and the said —— that either these presents or any will which the said —— may make or may have made shall be in any way irrevocable as between the said —— and myself ".

The Nature and Extent of the Rights

If it is found that mutual wills were in fact made in pursuance of a contract one term of which was that neither party would revoke his will without the consent of the other, then questions arise as to the extent of the rights conferred by such an agreement and as to the nature of the remedies available to the aggrieved party or to disappointed beneficiaries under a will which is revoked in breach of such contract. There are three branches of the law which might provide rights and remedies although, in fact, one does not. They are Probate, Trust, and Contract, and may be considered in turn.

Probate.

It is an elementary principle that a will as such is ambulatory until death and cannot be made irrevocable by any means. Thus it is said in *Vinor's Case* (1610), 8 Rep. 82 : " . . . If a man make his testament and last will irrevocable yet he may revoke it for his acts and words cannot alter the law to make that irrevocable which, of its own nature, is revocable ". In *Stone* v. *Hoskins* (*supra*), it was found on the death of the first testator to die that the will made under the contract had been revoked by a subsequent will. The survivor argued in effect that since the parties had agreed that the wills should not be altered or revoked, therefore they could not be altered or revoked; this was rejected and the Court pronounced for the later will. In *In the Goods of Heys*

(*supra*), it was found after the death of the survivor that she had executed a new will revoking her original will after she had taken benefits under the will of the other contracting party. It was held that the new will must be admitted to probate and the parties left to pursue any remedies which they might have in other divisions of the Court.

It can be asserted with confidence that Probate will without hesitation be granted of the last will of the deceased whether there has been any agreement or not and, as in *In the Goods of Heys* the parties to any agreement will be left to pursue any other remedies which they may have.

Trust—Where the Survivor has taken a Benefit under the Other's Will.

The leading case upon this branch of the subject is *Dufour* v. *Periera* (*supra*), and it is doubtful if any subsequent cases have added anything very much to the principles there enunciated. Its effect is stated by Clauson, J., in *Re Hagger* (*supra*) in the following terms : " . . . *Dufour* v. *Periera* decides that where there is a joint will, on the death of the first testator the position as regards that part of the property which belongs to the survivor is that the survivor will be treated as holding the property in trust to apply it so as to carry out the arrangement and effect of the joint will ".

As stated above, Lord Campden in *Dufour* v. *Periera*, decided as a question of fact that the joint will constituted a contract not to revoke : Clauson, J.'s statement of the position would be applicable to the general principle if for the words " joint will " are substituted the words " agreement to make mutual irrevocable wills ". If this substitution is made all that remains to be considered is what is meant by " that part of the property which belongs to the survivor ". It may mean one of many things, in particular it may mean all the property of which the survivor dies possessed, all the property which he possesses at the date of the first death or it may mean only that property which he inherits under the will of the first party to die.

Nowhere is there a simple and direct decision on the point and nowhere is the matter adverted to in the recognised textbooks. The learned editors of the *Encyclopædia of Forms and Precedents* (3rd ed., Vol. 18, p. 620n) express no very definite views but incline to the opinion that the trust attaches only to that property which the survivor inherits under the will of the other party and not even to that if the gift to him is absolute. This latter is an

amazing proposition. If the gift to the survivor is not absolute then the property passes after his death to the remaindermen designated in the will of the first testator to die by virtue of the provisions of that will so that the doctrine of *Dufour* v. *Periera* is unnecessary in respect of such property. If the learned editors are correct, therefore, in saying that the doctrine of *Dufour* v. *Periera* applies in that case only and does not apply to property which the survivor takes absolutely under the first will and does not apply to property which the survivor has from other sources, then the doctrine is valueless there being nothing upon which it can effectively operate, and the Courts and Judges from the time of Lord Campden onwards who have considered that doctrine have been vainly beating the air. In order to determine the property to which the trust attaches it is necessary to consider the principles upon which *Dufour* v. *Periera* was decided.

At p. 309 Harg. Jud. Arg. Lord Campden says : " A man may so bind his assets by agreement that his will shall be a trustee for the performance of his agreement. Or suppose he makes his will and covenants not to revoke it. These cases are common and there is no difference between promising to make a will in such a form and making his will with a promise not to revoke it. This Court does not set aside the will but makes the devisee, heir or executor trustee to perform the contract "; and at p. 310 : " . . . he that dies first does by his death carry the agreement on his part into execution. If the other then refuses, he is guilty of a fraud, can never unbind himself, and becomes a trustee of course. For no man shall deceive another to his prejudice. By engaging to do something in his power, he is made a trustee for the performance, and transmits that trust to those that claim under him ".

It is urged that the true basis of the doctrine of *Dufour* v. *Periera* is that when the first testator dies the agreement is irrevocably carried out on his part and the survivor is then under an equitable obligation to carry out his own part and his property, however and whenever acquired, is held subject to that equitable obligation—that is to say—it is held on trust to carry out the agreed provisions of the mutual wills and comes into the hands of his personal representatives impressed with that trust. This view is supported by the words of Loughborough, L.C., in *Walpole* v. *Orford* (*supra*), at p. 417, where he says, referring to the survivor : " . . . all she had was upon condition that she should dispose of her own property that she might have acquired after his death upon the dispositions of the will ".

If it should seem a little startling that the whole of the property of the survivor, whether or not in his possession at the death of

the first party to die, should be subject to the trust it should be recalled that the object of all legal remedies is to put the parties into the same position as they would have attained had there been no breach of contract or no tortious act or as the case may be. Suppose H. and W. to conclude an agreement to make mutual irrevocable wills; suppose further that each is at the time worth £1,000. H. dies and W. inherits his £1,000. Some little time after W., perhaps by judicious speculation upon football matches, acquires a further £100,000 : she considers altering her will but she remembers that she agreed with her deceased husband not to do so; she therefore does not alter her will and the mutually agreed residuary beneficiaries inherit the £102,000 less any capital W. may have spent. Suppose, however, that she decides deliberately to break her contract with her deceased husband and alters her will. How can the law put the interested parties into their proper position if the trusts created on the death of H. attach only to £1,000 or even to £2,000?

If the proposition that, on the death of the first testator to die, a trust for the beneficiaries of the mutual wills arises and attaches to the whole property of the survivor were strictly applied the survivor would be but a life-tenant of his property the beneficiaries having taken interests in remainder. This aspect has not been adverted to in the reports and in fact no claim has ever been made except over such property as the survivor possessed at his death. In *Fortescue* v. *Hannah*, 19 Ves. 62, a father had covenanted to leave his property in a specified manner amongst his children. Such a covenant is enforceable but the father, it appears, is not deprived of his right of expenditure although he cannot by the execution of an instrument having the effect of a testamentary disposition (*e.g.*, a settlement of himself for life with remainders over) evade his obligations, and it seems that this rule might by analogy be applied to the present case. The true position, therefore, of a survivor who takes a benefit under the will of the first testator to die is that he can be restrained from evading his obligation by methods such as that suggested above and that on his death his personal representatives take such property as he leaves, no matter how acquired, impressed with the trusts of the mutual wills or, more accurately, perhaps, impressed by such trusts of the mutual will as were intended by the parties to come within the orbit of their agreement.

This latter qualification is suggested by the latest decision on the matter: *Re Green*, [1950] 2 All E.R. 911. There were the usual mutual wills of husband and wife, executed in pursuance of a recited agreement : in each case there was a gift of the

residuary estate to the other spouse and in the event of lapse the residue, apart from a specific devise, was to be divided into two moieties, one being considered as the testator's personal estate, and the other as the benefit received from the estate of the other spouse. The first moiety was disposed of by clause 6 (b) of the wills and the second moiety by clause 6 (c). Vaisey, J., came to the conclusion that the moiety dealt with by clause 6 (b) was the testator's to do as he liked with, whilst " . . . with regard to the other moiety, *i.e.*, the moiety which was notionally the property of the first wife, the pre-existing will must take effect, not as a will, but as evidence of a trust which is plainly to be discerned (in the mutual wills constituting the agreement) ".

Now if, and in so far as, this language and this decision tends to suggest that the trust imposed by the rule in *Dufour* v. *Periera* only attaches to that part of the survivor's estate which represented property derived from the other's estate it is confusing if not misleading. With great respect it is suggested that the true reason why it was correct to hold that the survivor could leave one moiety to whom he liked was not that the trust attached only to one moiety but that, on its true construction, the agreement disclosed by the mutual wills was not, as it usually is, " In consideration of your making a complementary will I will leave all my property to you if you survive and to XYZ if you do not and furthermore I will not revoke my will without your consent ", but was rather, " In consideration of your making a complementary will I will leave all my property to you if you survive and half of it to XYZ if you do not and furthermore I will not revoke that part of my will as relates to this our agreement ".

Trust—Where the Survivor has Not taken a Benefit under the Other's Will.

In *Dufour* v. *Periera* and in all the subsequent cases in which it has been followed the position has been that the survivor has taken a benefit under the will of the first testator to die, has enjoyed it for the remainder of his life, and after his death it has been found that he had revoked his original will. What is the position if the survivor on the death of the other party, being aware of the rule in *Dufour* v. *Periera*, renounces his rights under the will, is he still bound by the doctrine? In other words does the doctrine in *Dufour* v. *Periera* depend on the acceptance of benefits?

It would seem that it does not and that the estate of the survivor will still be burdened with the same trusts. This view

is supported by the words of Clauson, J., in *Re Hagger* (*supra*) at p. 195 and if it is accepted that the basis of the rule in *Dufour* v. *Periera* is that the survivor, having allowed the other party irrevocably to perform his part of the agreement, is bound to perform his own part then the acceptance or non-acceptance of benefits cannot be relevant.

Contract.

In all cases, like *Dufour* v. *Periera*, where it is found on the death of the survivor that he has revoked his will in breach of his contract the persons interested are the residuary legatees under the agreed mutual wills and they cannot bring any action for breach of contract since they are not parties to the contract. It would seem that the personal representatives of the first party to the contract might have a cause of action but then they, or the estate they represent, have suffered no damage.

In other cases, however, it may be that the wrongful revocation has been, not by the survivor but by the party to the agreement who dies first and in this case the survivor may find a remedy in damages. There is no doubt that a contract or agreement not to revoke a will may be the subject of an action for damages. Thus in *Shepp. Touch* (Vol. 2, p. 401) it is stated :—

" When a man covenants not to revoke or alter his will this covenant will not control the will or bar the party of his right to alter it. It will merely give a right to damages if the covenant be broken ".

There are two circumstances in which an action for damages may be considered. First where it is found on the death of the first party to die that he has revoked or altered his will in breach of contract; secondly where the revocation is discovered during the lifetime of both parties. In either case there appears to be no reason whatever why the aggrieved party should not bring an action for damages for breach of contract, in the first place against the personal representatives of the party in default, in the second case against the party himself. In *Chitty on Contracts* (19th ed., p. 317) it is stated " if he who dies first has failed to perform his part of the bargain, the survivor who has notice of this upon the death of the first, cannot compel performance by obtaining a declaration of trust or otherwise, for it is open to him to alter his will as he likes ", and *Stone* v. *Hoskins* and *Re Hagger* are quoted as authorities to support the proposition. This is no doubt true. No declaration of trust under the rule in *Dufour* v. *Periera* can be obtained for the reason stated and, as stated above, the Probate Division will not concern

itself. But the fact that performance cannot be compelled is not relevant to the question whether or not damages can be obtained to compensate for non-performance and there is no reason why they should not.

It cannot be suggested that the doctrine of consideration raises any difficulties. The contract is: "In consideration of your making a will and keeping it unrevoked I will make a will and keep it unrevoked". The aggrieved party has carried out his side of the contract and may have damages for the breach of the other party. The measure of damages, however, is an interesting question: the aggrieved party must be put so far as possible in the same position as he would have attained had the contract been carried out. Where the defaulting party is dead when the action is brought the amount which the survivor would have taken under the will if it had been unrevoked is ascertainable but this is not all. Had the will been unrevoked he would have taken under it but his estate would have impressed with a *Dufour* v. *Periera* trust. As it is the other party has not performed his part of the bargain so no such trust arises and the measure of damages appears to be the value of the property the survivor would have taken under the will of the defaulting party less the difference in value between his estate subject to and his estate free from a *Dufour* v. *Periera* trust. Where the action is between the parties *inter vivos* as when the aggrieved party learns of the breach of contract before the death of the other party the measure is the same with the additional complication that the amount which he would take under the original will of the other party is not ascertainable but is a mere *spes successionis*. But the difficulty that may be found in quantifying damages, whilst it may discourage a particular form of litigation does not destroy it.

Finally, it may be mentioned that in one case no action for damages will lie; that is where the will is revoked by the subsequent marriage of a party. In that case the threat of an action for damages would be against public policy as being in restraint of marriage. Such eventuality is, however, severable from the rest of the contract. *Robinson* v. *Ommanney*, 21 Ch. D. 780, per Kay, J., at p. 783 and upheld on appeal, 23 Ch. D. 285.

LUNATICS AND INTESTACY

By W. J. L. Ambrose, Barrister-at-Law

Section 51 (2) of the Administration of Estates Act, 1925, is as follows:—

> "The foregoing provisions of this Part of this Act do not apply to any beneficial interest in real estate (not including chattels real) to which a lunatic or defective living and of full age at the commencement of this Act, and unable, by reason of his incapacity, to make a will, who thereafter dies intestate in respect of such interest without having recovered his testamentary capacity, was entitled at his death, and any such beneficial interest (not being an interest ceasing on his death) shall, without prejudice to any will of the deceased, devolve in accordance with the general law in force before the commencement of this Act applicable to freehold land, and that law shall, notwithstanding any repeal, apply to the case."

This sub-section has been in force for about a quarter of a century without receiving much judicial consideration. But in the last year or two it has cropped up in two cases which disclose remarkable differences of judicial opinion.

In each case the question was whether a share in the proceeds of sale of real estate arising under a trust for sale was a beneficial interest in real estate within the meaning of the section.

In the first case the trust for sale was created by section 33 of the Administration of Estates Act, 1925, and in the second case by section 39 and Part IV of Schedule I to the Law of Property Act, 1925. This, in the view of Jenkins, L.J., made all the difference between the two cases.

In *Re Donkin, Public Trustee* v. *Cairns*, [1947] 2 All E. R. 690; [1948] Ch. 74, Helen Donkin had been a defective since before January 1, 1926. In 1928 as sole next-of-kin to her brother, who died in that year, she inherited some freehold houses and she died in 1934. Some years after letters of administration to her estate were granted to the Public Trustee and shortly after that letters of administration to her brother's estate were granted also to the Public Trustee. The question then arose whether these houses passed to her heir under the old law or to her next-of-kin under the new law.

There was some argument based on the fact that until letters

of administration were granted the houses vested in the Probate Judge under section 9 of the Act. But Roxburgh, J., pointed out that no one could assert a beneficial interest against the Probate Judge without taking out letters of administration, and as soon as that was done section 33 of the Act created a trust for sale. The wording of the opening part of that section is:—

> "On the death of a person intestate as to any real or personal estate, such estate shall be held by his personal representatives—
>
> (*a*) as to the real estate upon trust to sell the same."

It is somewhat difficult to discover in that section an effective trust for sale so as to convert realty into personalty before any personal representative of the brother was constituted. But the learned Judge decided against the claim of the person who would have been Helen Donkin's heir under the old law because all that the sister had at her death was the right to have her brother's estate administered in accordance with the Administration of Estates Act, 1925, including section 33 and the trust for sale thereby created. He thought it necessary to confine the beneficial interests in real estate to such interests as would under the old law have devolved as freehold land. This made "beneficial interest in real estate" equivalent to "real estate" and excluded any interest in the proceeds of sale arising under a trust for sale of land.

The report does not show why he thought it was necessary to confine the meaning of beneficial interests in that way, and so to rule out any suggestion that the phrase "beneficial interests in real estate" deliberately extended in the case of a lunatic or defective the class of property which should in future descend as land. And it appears from the later case of *Re Bradshaw* that this part of his judgment did not meet with the approval of Evershed, M.R., or Somervell, L.J. The former said, "the phrase" (*i.e.*, beneficial interest in real estate) "was one of wide import, and did, because it was not in terms or by necessary implication excluded from so doing, according to the ordinary usage of language cover an interest such as this lunatic had, namely, an interest in the proceeds of sale of real estate held on trust for sale".

However, the Master of the Rolls thought Roxburgh's decision in *Re Donkin* was correct because in that case the lunatic had inherited her land after 1925. His reasons for this are indicated below. The reports of *Re Donkin* do not suggest that Roxburgh, J., attached any importance to that fact.

It may be observed that section 33 of the 1925 Act is in section 147 of the Law of Property Act, 1922, and section 51 (2) of the 1925 Act is in section 154 of the 1922 Act. And both are in

Part VIII of the 1922 Act. The trust for sale section is therefore in one of the foregoing provisions of this part of this Act (*i.e.*, the 1922 Act), and did not apply to defectives who die intestate. Whatever may have been the reason for the rearrangement of the sections in the later Act, the later Act superseded the earlier and clearly created a trust for sale on the intestacy of a defective or at all events when a personal representative is constituted.

Re Bradshaw, Bradshaw v. *Bradshaw*, [1950] 1 Ch. 78, first came before Danckwerts, J. William Bradshaw died in 1855 having devised some freeholds in trust for his son Thomas for life and after his death, in default of appointment by him (which happened), on trust for such of his children who should attain twenty-one equally. The son Thomas died before 1926, *i.e.*, in 1901, leaving Constance Mary Bradshaw and four other children who had then all attained twenty-one. In 1912 Constance Mary Bradshaw became of unsound mind and remained so till her death in 1948.

Under section 39 of, and the first Schedule to, the Law of Property Act, 1925, the land came to be held on the statutory trusts; and the undivided share of Constance Mary Bradshaw became a right to a share of the proceeds of sale and of the income until sale, and the question arose whether this was a beneficial interest in real estate. Danckwerts, J., was not much impressed by the argument for the next-of-kin, but he felt that he must follow *Re Donkin*. He added: " But if that be the true interpretation of the sub-section it seems to me that by some mischance the drafting of the sub-section has probably failed to carry out in this case the intention that persons with expectations of succeeding to real estate should not be defeated by the alterations in the law of descent made by the legislation of 1925 ".

The heir at law appealed. There is a short report of the appeal in [1950] W. N. 154 and a fuller report in [1950] 1 All E. R. 647.

The Master of the Rolls and Somervell, L.J., delivered judgments allowing the appeal. Jenkins, L.J., dissented.

Evershed, M.R., quoted the passage from the judgment of Roxburgh, J., set out above and said: " That sentence, which was the turning point of the judgment, was in his (his Lordship's) view capable of two constructions; it might mean that the phrase ' beneficial interest ' was confined to such an interest as *existed at the coming into force of the Act*, and would then have devolved as freehold land. Alternatively, it might mean a beneficial interest which, *whenever it came into the lunatic's possession*, would, but for the Act, have devolved to the heir at law. It appeared that Roxburgh, J., used the words in the latter sense. So used, it

seemed, though they were sufficient to decide *Re Donkin*, they would leave open the question whether the property to which the lunatic succeeded, and which at that time was undoubtedly real estate, was such as would but for the Act devolve on the heir. In his view *Re Donkin* was correctly decided but he based his reasons for so thinking on grounds somewhat different from those of Roxburgh, J. In his judgment, the clue to the matter was this: Beneficial interests in real estate covered by the sub-section must possess these three characteristics; they must have existed and belonged to the lunatic on January 1, 1926; secondly, they must also have existed and belonged to the lunatic at the time of his or her death; thirdly the beneficial interests must be such that at and immediately before the coming into operation of the Act they would have devolved as real propety and gone to the heir. If that were right, then *Re Donkin* (*supra*) was excluded from further consideration, for the first characteristic was there absent ".

He then discussed the meaning of " any beneficial interest in real estate " as quoted earlier and added : his decision was the result of the three characteristics which he found attributable to the beneficial interests covered by the sub-section. No doubt it means putting some gloss upon or explanatory language into the sub-section. He would read it thus:—

> " The foregoing provisions of this part of this Act do not apply to any beneficial interest to which a lunatic or defective living and of full age was entitled as real estate (but not including chattels real) at the coming into force of the Act."

The Master of the Rolls put the case of a lunatic having been a lunatic all his life and before 1925 acquiring in 1975 an absolute interest in freehold property and implies that section 51 (2) should not apply to such a case.

The reasons for the first characteristic—that the beneficial interest must have belonged to the lunatic on January 1, 1926—appear from the report in [1950] 1 All E. R. 647. The Master of the Rolls said:—

" The language provides that the beneficial interest concerned must be one ' to which a lunatic or defective living and of full age at the commencement of this Act, and unable, by reason of his incapacity, to make a will ', etc. The beneficial interest, therefore, must I think, be one in reference to which, at the date of commencement of the Act, the lunatic was ' unable to make a will '. In other words, it must have existed and belonged to the lunatic at that date. I reach that conclusion because the section goes on ' . . . who thereafter dies intestate in respect of such interest without having recovered his testamentary capacity '

and there is a further reference to any will 'in respect thereof', which the lunatic had made before his or her insanity, which *ex concessis* must have begun on December 31, 1925."

Somervell, L.J., agreed and said "The first question that I think has to be considered is whether or not section 51 (2) is confined to cases where a beneficial interest existed in the lunatic at the commencement of the Act. I come to the conclusion that that is a necessary condition of the application of the sub-section, and I think the actual words used in the sub-section are capable of either construction, but I think, whichever of the two constructions is put on them, it might be said that the language is not so completely clear or as apt as, perhaps, it might have been. I come to that conclusion for these reasons. I think the opening words plainly point to this construction. The fact that the person entitled must be a lunatic of full age at the commencement of the Act, naturally, though not perhaps necessarily, indicates that it is to that date that you look to see whether he has any beneficial interest in real estate of which he was not able to make a will. Then the later words, 'was entitled at his death', naturally have to be inserted, because there must be two conditions if the *prima facie* view I have expressed about the commencement of the Act is right. Obviously, the section must not operate or purport to operate, unless the interest still subsists at his death. I, therefore, come to that conclusion for the reasons which I have shortly expressed, and for the reasons given by the Master of the Rolls".

If the section means what the Master of the Rolls and Somervell, L.J., say it does, one can readily agree with the latter's observation that the language is not as clear or apt as it might have been, and with the comment of Danckwerts, J., that the drafting has probably failed to carry out the intention that persons with expectations of succeeding to real estate should not be defeated by the alterations in the law of descent.

If the Crown in Parliament decided to extend some protection to the expectation of heirs to lunatics, there is no apparent reason why the extent of that protection should depend on the date when the lunatic acquired the property. It seems capricious that the heir should succeed if the lunatic acquired the property before 1926, but should not get it if the lunatic acquired it after 1925. But if that was the intention of the legislature it would have been so easy to have said "was entitled on *January* 1, 1926, and at his death".

No doubt if a lunatic acquires real estate in 1975 and dies a lunatic the legal profession will have forgotten a good deal about the old rules of inheritance. But the legislature does not hesitate

nowadays to set the lawyers difficult tasks and this explanation seems most improbable.

Jenkins, L.J., expressed a very definite and clear dissent. As it was a minority opinion it will suffice to quote a short passage to indicate his view: "The conversion of that undivided share into personalty was effected, not by Part IV of the Administration of Estates Act, 1925, at all, but by the Law of Property Act, 1925. A sub-section which purported to be a saving from the application of 'the foregoing provisions' of Part IV of the Administration of Estates Act, 1925, was *prima facie* not the appropriate vehicle for the saving of an undivided share of an intestate from the results of the conversion effected by a wholly different Act. One would expect the saving in section 51 (2) of the Administration of Estates Act, 1925, to be concerned simply with the innovations in the way of rules as to devolution of property in intestacy effected by that Act and nothing else. In his judgment that was precisely what that subsection did refer to".

He also held that an interest in the proceeds of sale under the statutory trust for sale was not a beneficial interest in real estate.

No doubt the trust for sale created by section 33 of the Administration of Estates Act, 1925, is merely a convenient device for sharing out property amongst two or more beneficiaries, and if not required can be put an end to by assent, conveyance or appropriation. But the trust for sale resulting from undivided shares is not such a domestic affair and may affect the interests of so many persons as to become almost a question of public policy. The first point taken by Jenkins, L.J., must have cropped up in the course of the argument and it seems odd that no other member of the Court said anything about it.

What are the propositions of law established by these cases?

1. A share in the proceeds of sale under the trust for sale created by section 39 of the Law of Property Act, 1925, is a beneficial interest in real estate within section 51 (2) of the Administration of Estates Act, 1925. So held by two L.JJ. in *Re Bradshaw* (*supra*).
2. So is a share in the proceeds of sale arising under the trust for sale created by section 33 of the Administration of Estates Act, 1925. This seems to follow from the observation of the same L.JJ.
3. The beneficial interest must have existed and belonged to the lunatic on January 1, 1926. This is distinctly stated by the same L.JJ. in *Re Bradshaw* (*supra*)—but in that case the lunatic had unquestionably acquired his beneficial interest before that date and the observations

of the L.JJ. on this point were not a prelude to or the foundations of their judgments. They were apparently made for the purpose of reconciling the decision in *Re Donkin* (which was not under appeal) with their decision in *Re Bradshaw* and if and so far as they were *obiter dicta* the authority for this proposition is impaired.

SERVICE OCCUPANCY: A WARNING

Several readers have informed us that they have submitted for stamping Agreements based on those printed on pages 402 and 404 of Volume 14 of *The Conveyancer*, and that the Controller of Stamps has insisted that the documents are liable to duty as leases. These cases have been referred to the draftsman, Mr. Simpson, who is of the opinion that in both these forms occupation and service are interdependent and this fact would effectively debar the occupier from enjoying the premises as a tenant. As, however, the Controller of Stamps has given his ruling that these documents are subject to Lease Duty, there appears to be no option but to accept the Controller's view.

The question arises whether the fact of such stamping is liable to prejudice the employer, and, in the event of litigation arising under the Agreements, of their being considered as Leases by the Court. None of the textbooks give any guidance on this point, but it is being looked into and we hope to publish a note in our next issue.

Meanwhile we think it desirable to warn Subscribers that the fact that these Agreements are stamped as leases may be used as an argument that they are not in fact effective in avoiding the application of the decision in the *Three D's Company* v. *Burrow*.

NOTES OF RECENT CASES

1. *LAW OF PROPERTY AND CONVEYANCING*

By S. M. Tolson, Barrister-at-Law

Settled land—Charge by tenant for life not disclosing settlement—Settled Land Act, 1925, *s.* 18.—Where a tenant for life makes a "Disposition" (within the meaning of the Settled Land Act, 1925) of the settled land as beneficial owner, the disposition may be fraudulent (but not a forgery), and is void by section 18 of the Act.

This case, which has received so little publicity in spite of its importance, was *Weston* v. *Henshaw,* [1950] Ch. 510, decided by Danckwerts, J., where the property in question was sold to a son by his father, who then bought it back from him and settled it by will. When the son became tenant for life, he charged the property purporting to act as beneficial owner and showing the first conveyance from his father. On his death, the next tenant for life, who discovered the fraud, asked for a declaration that the charge was void as against him.

The learned Judge decided that the charge was not a forgery, as, in so many words, it did not tell a lie about itself. The words "as beneficial owner" were not necessary to the charge, and only implied covenants. It was, in fact, a fraud by suppression of the truth rather than by wilful misstatement.

The argument was rejected that section 18 (1) (*a*) must be read in conjunction with section 112 (2) of the Settled Land Act, 1925, as this construction would make the former section nonsensical. This argument was by analogy to the way in which section 13 of the Act was read in conjunction with the latter section in *Re Alefounder's Will Trusts,* [1927] 1 Ch. 360, and it was held that section 13 applies only when the tenant for life purports to act as such.

It was secondly rejected that the proviso to section 98 (3) of the Act, requiring that the trustees shall see that a notice of the last principal vesting deed be written on one of the tenant for life's documents of title (and not complied with in this case), indicated that the legal estate might be lost on a disposition such as this by him. Thirdly, section 110 (1) of the Act gave no protection to the other party as it applied only where the other party knew he was dealing with settled land.

This case exposes another flaw on the Settled Land Act machinery, but seems the only satisfactory interpretation of the section, which was probably unforeseen when the Act was drafted.

Joint-tenancy—effect of deed by one joint tenant to disclaim interest.—" I do not believe that disclaimer can be made by one of several joint tenants, because I think that the unity of the estate and of the interest in the estate enures for the benefit of each and all who have one undivided and indivisible property in the subject-matter of the gift, . . . I think that the only disclaimer which joint tenants can make is one which is made by them all." This was said by Vaisey, J., in *Re Schar,* [1950] 2 All E. R. 1069, where under a will and an order of the Court, a bank acting as trustee became beneficial joint tenant with two other trustees of certain legacies and shares of residue. The bank did not wish to handle the money and executed a deed, the subject of the summons. The operative part of the deed was a disclaimer, but it was described as a release in the recital and joined the other trustees as parties, who however did not execute it and who were not expressed to take any interest under the disclaimer or release.

The learned Judge, after making the observation referred to above, referred to *Re Wilks,* [1891] 3 Ch. 59, which dealt with the severance of a joint tenancy. There was no severance in this case, but the learned Judge held that notwithstanding that the other trustees were not expressed to take any interest under the deed it operated as a release to them of all the interest of the bank.

This case, as much as settling what must be the law, shows what trouble can be caused by bad drafting.

Secret trust.—A testator left his entire estate to his widow for life, and appointed his widow and X to be his executors, " it being a condition of this will " that after his death his widow should make a new will " for the purposes she knows he " (the testator) " desires it to be used for . . .". X died soon after the testator and probate of the will was granted to the widow who applied to the Court for directions as to the construction of the will. She submitted an affidavit (which was admitted in evidence) as to the wishes of the testator which had been discussed with her prior to the execution of the will. These were the facts in *Re Young,* [1950] 2 All E. R. 1245.

The argument that a mere power to dispose of the property had been given, and therefore following *Re Hetley,* [1902] 2 Ch. 866, parol evidence could not be admitted to show what the testator's wishes were, was rejected. Mr. Justice Danckwerts held that the words " it being a condition of this will " pointed clearly on the contrary to an imperative trust.

He also held, following *Re Gardner,* [1920] 2 Ch. 523, that the fact that the widow would be dead when the trusts came into effect, and that X was already dead, did not make them any the less trustees for the future purposes, and that, as in the earlier case, the trustee was executor and therefore had a legal estate on to which the trust could be tacked.

In upholding the secret trusts, he noted, following Wood, V.-C., in *Moss* v. *Cooper,* as quoted by Lord Warrington in *Blackwell* v. *Blackwell,* [1929] A. C. 318, at p. 341, that the fact that they were

communicated to one trustee only would have been irrelevant, and that in making her will the widow would be merely putting on record trusts already in existence. She would not be making a will for the testator, or disposing of something she had not got.

Sale of land—payment of purchase money into Court—liability to pay interest.—" It would be strange that a purchaser, admittedly in possession and in default, could stop interest running " by a lodgment of the purchase money in Court having regard to a proviso in the contract " which only allows the avoidance of payment of interest to a purchaser who is neither in possession nor in default." This point in the absence of any previously reported decision, was decided by Harman, J., in *Pearlberg* v. *May,* [1950] 2 All E. R. 1022, which concerned the effect on the contractual right to interest, of the order commonly known as a Greenwood and Turner order, to pay overdue purchase money into Court. The sole matter in dispute when the case was heard was whether the purchaser was liable for interest as under the contract, or whether the vendor must be satisfied with the sum paid in plus the interest earned on deposit in the Pay Office.

The learned Judge decided, as indicated above, that the contractual rights must survive, though the purchaser was entitled to be credited with the interest earned on deposit together with the interest at 4 per cent. between the date of the order and the lodgment of the money, paid in under the order.

Sale of land—Note or memorandum—section 40 *of the Law of Property Act,* 1925.—The welter of judicial interpretation which surrounds section 4 of the Statute of Frauds, 1677, and the above section, has, surprisingly enough, received yet one more extension. Where it is sheer affectation to pretend that it is not obvious that two documents refer to the same transaction, they may be connected together without the aid of parol evidence, jointly to supply an effective memorandum in writing. This was decided by Harman, J., in *Burgess* v. *Cox,* [1950] 2 All E. R. 1212, following Lopes, J.'s judgment in *Sheers* v. *Thimbleby & Son,* (1897), 76 L. T. 709, at p. 711.

In this case the defendant's signature was missing from the memorandum, and was supplied by reading it together with a subsequent letter from the defendant describing what had taken place when the memorandum was signed.

The plaintiff lost her case, however, as one of the agreed items of sale was not contained in either document and it was not open to her to concede the missing term in favour of the defendant in order to recover for breach of contract. The learned Judge disapproved of the statement in *Williams on Vendor and Purchaser,* 4th ed., p. 5, and distinguished *North* v. *Loomes,* [1919] 1 Ch. 378. For while, if an omitted term detrimental to the defendant is waived, it may be possible nevertheless to enforce the contract, yet it is not possible

to do so if an omitted term in the defendant's favour is conceded to him, for this is carrying out something not in the memorandum.

Donatio mortis causa.—" In our judgment, Byrne, J., in *Re Weston* (1902), 1 Ch. 680, and Luxmoore, J., in *Delgoffe* v. *Fader*, [1939] 3 All E. R. 687, went further than was necessary in stating that a record of all the essential terms of the contract in the document handed over was a condition or test of validity of the *donatio mortis causa*. We think that the real test is whether the instrument handed over is the essential *indicia* or evidence of title, possession or production of which entitles the possessor to the money or property purported to be given so that the delivery of the instrument 'amounts to a transfer'." This was said by Sir Raymond Evershed, M.R., in *Birch* v. *Treasury Solicitor*, [1950] 2 All E. R. 1198, where *Delgoffe* v. *Fader* (*supra*), was distinguished on the facts. Certain bank deposit books were held to be such *indicia* or evidence of title even though the rate of interest was not contained in them, and even though their production while contractually necessary, was not always insisted upon when withdrawing money.

It was also unsuccessfully argued on the facts (which are too lengthy for a full report here) that there had been no sufficient delivery to the two donees, and that the deceased had not parted with the dominion over the bank balances when she parted with the possession of the bank books.

Sale by sheriff—right of true owner against purchaser—section 15 *Bankruptcy and Deeds of Arrangement Act*, 1913.—In *Curtis* v. *Maloney*, [1950] 2 All E. R. 982, a sheriff under a writ of *fieri facias* seized a motor cruiser in the possession of an execution debtor, and sold it at an advertised public auction. After the auction it was claimed by the plaintiff, who brought an action in detinue against the defendant, the purchaser. The Court of Appeal unanimously held that on the interpretation of section 15 of the Bankruptcy and Deeds of Arrangement Act, 1913, the purchaser got a good title against all the world, and, upholding Finnemore, J., that the proviso to the section was inserted to preserve the rights of the original owner against the execution creditor and any wrongdoers prior to the sale.

Denning, L.J., said: "I do not think we ought to whittle down the protection which Parliament has given to innocent purchasers. In a commercial community it is very important that their title should be protected".

Settled land—improvement rentcharge—" redemption "—" tithe annuity "—" discharge "—Settled Land Act, 1925, *s.* 73 (1) (*xiii*) *and* (*xiv*).—In *Re Sandbach*, [1950] 2 All E. R. 1195, Vaisey, J., held that " redemption of an improvement rentcharge " in section 73 (1) (xiii) of the Act means compounding of future payments and not the payment of instalments as they come due. Also that " discharge "

of tithe redemption annuities in section 73 (1) (xiv) of the Act means commutation for a lump sum only, so that in both cases a tenant for life could not recover from the capital moneys of the settled fund such portions of the payments she had made as represented capital.

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2. *CHARITIES*

Relief of "aged persons".—Two more reported cases on the relief of aged persons are now reported and seem to carry the law a little further. *Re Robinson,* [1950] 2 All E. R. 1148, arose on a gift of residue "to the Little Sisters of the Poor of Longton and Stoke-on-Trent and the old people over sixty-five years of Hazel Slade near Hednesford to be given as my trustees think best". Vaisey, J., held that (i) the gift was of two equal shares notwithstanding the absence of words of severance; (ii) one-half went to the branch of the institution of the Little Sisters of the Poor represented by the Mother Superior of the institution "identified by her evidence as St. Augustine's, Hanley near Stoke-on-Trent"; (iii) the discretion given to the trustees was limited to the second half in favour of "old people over sixty-five years"; and (iv) "old people over sixty-five years" in a particular parish were just as much objects of charity within the Charitable Uses Act, 1601 (43 Eliz. c. 4) as were the poor of the parish or the sick of the parish.

The whole of this decision is worthy of careful notice, and particularly from the point of view of drafting, but it must be remembered that there were other provisions of the will which had of course to be read as a whole. Particular attention may be directed to the decision that the limitation of the discretion of the trustees which resulted in half the estate passing to the Little Sisters of the Poor notwithstanding that there were no words of severance. With regard to the discretion the learned Judge directed that a scheme should be brought into chambers and settled for the administration of the moiety to be held for the old people, because it required "to be defined by the appropriate method of a scheme"; though such a scheme should leave "a proper discretion in the hands of the trustees".

The most significant feature of the decision, however, is to be found in the decision that the gift for old people was charitable notwithstanding that it was not qualified by reference either to poverty, sickness or impotence. The learned Judge held that it was sufficient for such a gift to be subject to any one of these qualifications (a) aged; (b) poverty; or (c) sickness or impotence. In so holding the learned Judge was following the decision of Danckwerts, J., in *Re Glyn,* 66 T. L. R. (Pt. 2) 510 (noted Vol. 14, p. 400 (h)) and his own decision in *Re Bradbury,* [1950] 2 All E. R. 1150 (n). The second case was a gift to found a fund to pay "for the maintenance of an aged person or persons in a nursing home". In this case the learned Judge said, after pointing out that Danckwerts, J., had held that words "aged, impotent and poor" should be read disjunctively,

" I think that the present case is very near the line ". It is respectfully suggested that *Re Robinson* (*supra*) goes rather further than *Re Bradbury* (*supra*), since the reference to " maintenance " in *Re Bradbury* suggests the need of support which is not far removed from " necessitous " and " necessitous " has at least an affinity with poverty. This too may be implied by the word " relief " in the statute. *Re Robinson,* however, has no limitation at all and, therefore, apart from any restrictions imposed by the scheme there seems no reason to exclude well to do aged persons.

It is thought that this aspect of the statute, comparatively novel after 350 years, will need careful consideration. Owing to the lack of domestic help and the increase of small houses, etc., many schemes are now on foot for assisting aged persons—it is the problem particularly of the aged widow or spinster who cannot be conveniently accommodated in the younger homes. While there is much to be said for treating these schemes as charitable (and, therefore, free from tax liabilities) we are not convinced that really the Courts will go so far as this.

From a drafting point of view it seems that so long as these cases stand a gift intended to assist aged persons without reference to poverty can be created, but the draftsman may well be advised to insert some such limiting words as " charitable purposes for the relief of aged persons ".

(Tudor, p. 24.)

Relief of poverty.—The essential problem of the last note appears more directly in connection with relief of poverty in *Re Young,* [1950] 2 All E. R. 1245, though the report is mainly concerned with other questions. Here a gift was made " for the permanent aid of distressed gentlefolk and similar purposes ". Danckwerts, J. (at p. 1250), had no difficulty in holding that this was a good charitable bequest, " since it is for the relief of poor persons, and the reference to ' similar purposes ' does not detract from the charitable nature, being controlled by the words which precede the three words ' and similar purposes ' ".

It is obvious that " gentlefolk " may be " distressed " on a standard of living that not all would call poor. This difficulty has already been experienced and was discussed at some length by Channell, J., in *Mary Clark Home Trustees* v. *Anderson,* [1904] 2 K. B., at p. 656, though not directly on the point of charity, and Eve, J., in *Re Gardom,* [1914] 1 Ch., at p. 668, when he followed the earlier decision. It was assumed that such will was charitable (the question being " public charity ") in *Shaw* v. *Halifax Corpn.,* [1915] 2 K. B. 170. All of these cases deal with charities for " reduced gentlewomen " in some form or another, and all seem to assume that abject poverty is not an essential. The fact remains that the cases, to which we have referred, are little more than a general guide to the problem, because, as Channell, J., said: " I do not know any standard of poverty, nor how I can lay down any rule ": and he even went on to suggest that this was a matter the trustees must determine, but, as

we have said, the decision was not one primarily on the general question of charity.

Actually this decision links up with the practical point mentioned in our last note—the provision of homes or institutions for aged persons no longer able to live by themselves but not necessarily "poor" in the ordinary sense, though obviously not well to do. Those concerned with drafting the trusts of any such institutions need to consider how far, if at all, the question of charity is material, but in these days relief from taxation for charities may be a very serious issue.

(Tudor, p. 26.)

Education—public purpose.—Oppenheim v. *Tobacco Securities Trust,* [1951] 1 All E. R. 31, appears to raise as many questions as it solves. The House of Lords have held that a trust for the education of employees and their children is not a good charitable trust because it is not a "public" trust. This follows on from *Re Compton,* [1945] Ch. 123 (noted Vol. 9, p. 152), where we suggested that members of the public capable of benefiting may be limited by reference to locality but not necessarily in another way.

It is first important to point out that this decision follows a long line of modern cases emphasising the "public" character of charitable trusts, and making it a prerequisite to validity. What, however, they do not do is to explain what "public" means. It is thought that limitation by locality could not be held to prevent the "public" character. It is also thought that limitation by reference to some classes are not necessarily not public; *e.g.,* poor clergymen of the Church of England. What is not clear is why educating the sons of clergy of the Church of England should be charitable, and educating the employees of Messrs. X & Co. is not charitable. It is submitted that the cases are becoming confused between the character of the beneficiaries and the source of the charitable fund. Nevertheless, the test that seems to have been applied was as follows: first, if the members benefiting are to be ascertained by a personal relationship, such as descent, they are not members of the public; *Re Compton* (*supra*); therefore, if the common quality of the beneficiaries is found in employment by particular employers, then again they are not a section of the "public" within the meaning of charity. The fact that it included children of employees too was regarded as being incapable of distinction.

It is suggested that this decision raises a number of issues, for example, the charitable character of "closed scholarships" where the "common quality" is membership of a single school or college, but that in all probability it will not be extended beyond a "common quality" of personal relationship, including in personal the character of employment by a corporation, other perhaps than a public corporation.

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3. *WILL CASES*

By A. K. R. KIRALFY, Ph.D., LL.M., of Gray's Inn, Barrister-at-Law

Will—Legacy—Misdistribution—Right of recovery by legatee.—Minister of Health v. *Simpson* (H. L.), [1950] 2 All E. R. 1137; 66 T. L. R. (Pt. 2) 1015 (affirming *Re Diplock,* [1948] Ch. 465 (C. A.)). The various categories of equitable jurisdiction are not all of a piece. On the one extreme we have the cases in which equity intervened to defeat the common law, as in the law of trusts and the law of mortgages. Here the petitioner had a heavy task in satisfying the Chancellor that the defendant's legal right to retain property of which he was trustee or mortgagee could not, in conscience, be defended. On the other extreme the Chancery Division may be asked to deal with an infringement of copyright or the interpretation of a conveyance, for reasons of convenience, and with little reference to conscience. The law of administration of assets stands between the two. It is well known that there is a tendency to equate the law of trusts and that of administration of estates in many points. Yet it is clear that the right to recover a bequest by will in Chancery did not originate to defeat pre-existing law, but was a continuation of the right to sue in the Ecclesiastical Courts before the Civil Wars. The right of a legatee was created by the law and not by equity. Thus, under the Commonwealth, a legatee could sue for a legacy in a common law action on the case, since the Ecclesiastical Courts were suspended and some remedy had to be found for his undoubted right. The claim of a legatee, therefore, is satisfied *ex debito justitiæ* and not *ex gratia.* These historical reasons may help us understand the straightforward reasoning behind the decision of the House of Lords in this important " Diplock action ", delivered by Lords Simonds in a judgment which is as lucid as it is distinguished.

In this famous case executors paid out legacies which turned out to have been legally invalid. The persons legally entitled on failure of these legacies have now been held entitled to sue the supposed legatees personally for repayment of the amounts received by them. It is immaterial whether the executors paid under a mistake of law, since the plaintiff was not a party to the mistake. It is immaterial whether or not the supposed legatees had notice of the mistake. It is immaterial that the supposed legatees have spent the money in good faith. The law is now placed on a clear footing. But the following points are left open by the House of Lords: (i) the treatment of a misapplication by a trustee, as distinct from a personal representative; (ii) the limits of any remedy *in rem,* by way of tracing.

The testator died in March, 1936, the executors' year ended in March, 1937. The defendant hospital first had notice of the mistake in 1939. The present litigation began in 1945. It was held that the Limitation Act, 1939, s. 20 applied, and that, as there had not been twelve years' lapse from 1937 to 1945, the claim was not statute-barred. Section 20 is limited to claims to the personal estate of deceased persons. Section 26, which refers to fraud and mistake,

was not dealt with, as this question would only have arisen if the claim had been barred under section 20.

It is to be noticed that the claim, in this type of case, must initially be made against the executor, the real "culprit", and for reasons of convenience. The legatees are only liable for any deficiency, above the assets of the executors. In the instant case, owing to the very large sum of money involved, the executors were only able to make good a small fraction of the loss.

This case is the first "Diplock" appeal to reach the Lords. If other appeals are tried, other questions, *e.g.*, the character of the remedy *in rem* may be elucidated.

Will-attesting witness—Forfeiture of legacy—Wills Act, 1837, *s.* 15.—*Re Young,* [1950] 2 All E. R. 1245. (This case will be found discussed on another page, in relation to the general problem of secret trusts.) The essential nature of a secret trust is said to be that of a trust constituted by the testator and the trustee outside the will, and *inter vivos* (*Re Gardner,* [1923] 2 Ch. 230). Where a will confers an interest on X, and X has accepted a secret trust in favour of Y before the testator's death, Y does not take "under the will". Hence Y does not lose the benefit of his secret trust if he attests the will. Danckwerts, J., refused to follow the contrary decision in *Re Fleetwood* (1880), 15 Ch.D. 594, as decided *per incuriam* and without argument on this point. It is not stated whether Y knew of the arrangement in his favour, and this appears to be immaterial.

(Theobald 92.)

Will—Property passing on death—Legal estate as subject of will. —*Re Young* (*supra*). A testator made his wife his executrix and gave her a life interest by his will. By a secret outside arrangement he told her to give the remainder on her death to J. S. The will instructed her to declare the trusts of this remainder by her will. It was clear that she could not make a will for the testator. How could she dispose of the remainder, which did not belong to her? The learned Judge held that the legal estate which vested in her as executrix, subject to the future trust on her death, was a sufficient subject-matter for a will by her, leaving the property beneficially to J. S. This decision is obviously convenient, but the position is curious. It resembles the creation of a power, but is strictly imperative. The widow's will was the mere channel by which the trusts were performed. Had she failed to make any will, no doubt J. S. could have recovered his property in any case. There was no attempt to bequeath the trusteeship. Her personal representative would be trustee, on general principle, to see that J. S. was paid.

(Theobald 68.)

Will — Partial intestacy — Liability for hotchpot stirpital — A. E. A., s. 49.—Re Young's Will Trusts, [1950] 2 All E. R. 1040. A testator leaves his estate in three or more parts, one of which lapses through the prior decease of the legatee H. Another part is left on discretionary trusts for a child of the testator, C., limited to his life, remainder to C.'s children. C., an intestate successor, is entitled to share in H.'s lapsed gift. What proportion of the property left to C. and his children must be brought into account? Harman, J., held that C. must account for the capital value of the whole, and not merely the extent to which he himself benefited. The learned Judge referred to the wording of A. E. A., 1925, s. 49 (*a*) ("beneficial interests acquired by any issue of the deceased") which contrasted with the use of the word "child" in section 47 (1) (iii). Each *stirps* is therefore a unit for hotchpot purposes. This decision agrees with the tendency to use the stirpital rather than the capital unit. On the other hand it is not obvious that the legislature meant this distinction to be made. A. E. A., s. 49, in its references to "issue" no doubt meant to impose, on "issue" in all degrees, liability to account. It does not appear that it meant each of them to account for something he individually never received. Had section 49 referred to "issue of the legatee" it would be clear, but it simply refers to "issue of the testator". If "issue of the testator" can be read vertically it can also be read horizontally. Would C. also have to account for gifts received by his brothers and sisters, or by their children? If C. and C.'s child both belong to the class of "issue", so do C. and his brother and his brother's children. Would C. have to account for a legacy to his niece or nephew? The principle is, with respect, difficult to appreciate.

(Theobald 567.)

Will—Condition—Validity—Importance of motive.—Re Fentem, [1950] 2 All E. R. 1073. The present case is odd in form and not entirely satisfactory in principle. Residue was left to A for life, with alternative disposition of the remainder, *viz.*, to his estate if he had not married, to X Y if he had. The problem whether this disposition created a condition subsequent or a condition precedent was left open in the event. The doctrine of merger probably made it a condition subsequent, *Re Lanyon,* [1927] 2 Ch. 264. The crux of the case was the validity of the condition. Harman, J., referred to the well-known case of *Re Hewett,* [1918] 1 Ch. 455, to show that not every condition in restraint of marriage is bad. In the 1918 case the motive of the testatrix in forfeiting the gift had been unimpeachable, the desire to provide for those most in need of help. A spinster needs more provision than a woman with a husband to support her. In the present case the circumstances were much weaker. The testatrix knew that the legatee, a man, was likely to marry a close mutual friend. She did not, however, cut down his life interest. The learned Judge thought that the testatrix did not realise that the doctrine of merger would give the legatee an absolute interest and that her condition was therefore likely to discourage his marriage (which in fact occurred before her death). Some emphasis must be laid on the small size of

the estate, unlikely in fact to deter a man from a marriage, or for the testatrix to have thought it would in fact do so.

(Theobald 438.)

Will — Construction — Latitude in describing property. — Re Young (supra). A testator left "all his worldly goods and chattels both real and personal". Danckwerts, J., held that this was not limited to chattels real and chattels personal but passed his whole estate, including freehold land. He refused to follow a contrary *dictum* of Lord Hardwicke, L.C., in 1752, emphasising the greater latitude shown by the Courts at the present time, *e.g.*, in the construction of "money". The implications of the present decision go far beyond its facts. The testator's intention is not to be frustrated by technical rules of which he is obviously ignorant.

(Theobald 169.)

Will—Construction—Date for performance.—Re Fentem (supra). The words "if he shall have married", in the future perfect, cover the entire period after the execution of the will, and not only the period after the death. *Re Chapman,* [1904] 1 Ch. 431 was followed.

(Theobald 445.)

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4. *LANDLORD AND TENANT CASES*

By J. Muir Watt, M.A., of the Inner Temple, Barrister-at-Law

Rent Restrictions Acts—addition of garage to letting of dwelling-house—garage to be treated as part of dwelling-house—change of identity—justification of new standard rent.—As mentioned in these Notes for December, 1950, the decision of the Court of Appeal has been reversed by the House of Lords in *Langford Property Co.* v. *Batten,* [1950] 2 All E. R. 1079. The fallacy of the Court of Appeal's reasoning, according to the House (Lord Goddard dissenting), lay in assuming that because land or premises (in this case a garage) let with a dwelling-house must, as a result of section 3 (3) of the 1939 Act, be treated as *part of* the dwelling-house, the house with the land or premises is necessarily *the same entity* as the house without the land or premises. If the land or premises are sufficiently substantial, their addition may result in a change of identity, with the result that a new entity is being let for the first time, and a new standard rent can be justified. Lord Goddard feared that this view opened the door to evasion of the Acts. Lord Porter preferred the reasoning of *Vaughan* v. *Shaw,* [1945] K. B. 400 to

that of *Hemns* v. *Wheeler*, [1948] 2 K. B. 61, but doubted whether there was a real conflict.

(Rent Restrictions Guide, 3rd ed., pp. 30–32.)

Rent Restrictions Acts—effect of unconditional but suspended order for possession upon transmission of statutory tenancy.—In *American Economic Laundry, Ltd.* v. *Little*, [1950] 2 All E. R. 1186, it was held that a tenant against whom a final order for possession had been given, but who died during the period for which the execution of the order had been suspended, was not a "tenant" within section 12 (1) (*g*) of the 1920 Act, so as to transmit a statutory tenancy to his daughter, who had been living with him for the qualifying period at the time of his death. The opposite decision would have added yet one more fantastic anomaly to this branch of the law. Somervell, L.J., expressly reserved the position where a conditional and not (as here) an absolute order had been made against the deceased.

(Rent Restrictions Guide, 3rd ed., pp. 101, 134.)

Rent Restrictions Acts—"member of tenant's family"—section 12 (1) (*g*) *of* 1920 *Act—first cousins not included.*—Cases on the meaning of "family" in the Rent Restrictions Acts continue to arise. In *Langdon* v. *Horton*, [1951] 1 All E. R. 60, first cousins were held not to be "members of the tenant's family" within the "ordinary, popular meaning" test of *Brock* v. *Wollams*, [1949] 2 K. B. 388, and thus not entitled to the protection of section 12 (1) (*g*) of the 1920 Act.

(Rent Restrictions Guide, 3rd ed., p. 102.)

Rent Restrictions Acts—section 3 (3) *of* 1933 *Act—"the tenant and his family".*—In *Darnell* v. *Millward* (1950), 66 T. L. R. (Pt. 2) 1100, it was held that in a case where a married couple had come to live with an elderly man in order to look after him, the wife acting as his housekeeper, the couple and their child could not be regarded as members of his "family", within the meaning of section 3 (3) of the 1933 Act, so as to make it necessary to consider their needs in connection with the offer of alternative accommodation.

(Rent Restrictions Guide, 3rd ed., pp. 83–85.)

Rent Restrictions Acts—section 12 (1) (*g*) *of* 1920 *Act—"leaves no widow"—"member of tenant's family".*—In *Tinkham* v. *Perry* (1951), 101 L. J. News. 7, it was held that the words "leaves no widow" in section 12 (1) (*g*) of the 1920 Act must be read in their ordinary sense and were not to be taken as limited to a widow actually residing with the tenant at the time of his death. In this case the

tenant, a statutory tenant, was living in the dwelling with his mistress up to the time of his death. He was separated from his wife. It was argued that he "left no widow", in the sense of no widow residing with him at the time of his death, and that, therefore, his mistress qualified for protection as a "member of the tenant's family" so residing with him. The Court, however, refused to limit the meaning of "leaving no widow" in this way, and as a result the question whether his mistress could claim protection as a member of his family did not arise.

(Rent Restrictions Guide, 3rd ed., p. 102.)

Rent Restrictions Acts—"obligation of the tenancy"—1933 Act, First Schedule, paragraph (a)—undertaking by the tenant to remain in employment of third party not an obligation of tenancy.—In *R. M. R. Housing Society, Ltd.* v. *Combs*, [1951] 1 All E. R. 16, the Court of Appeal held that an undertaking given by the tenant to remain in the employment of a third party (the landlords and the third party were associated companies) as a condition of the continuation of the tenancy, was not an "obligation of the tenancy" within paragraph (*a*) of the First Schedule to the 1933 Rent Act, so as to enable the landlords to rely upon its breach as a ground for possession. It was not an obligation binding upon the tenant *qua* tenant, but, if anything, a personal and collateral obligation. The Court added that if it could be regarded as an obligation of the tenancy it would, in any case, be one which was inconsistent with the provisions of the Acts.

(Rent Restrictions Guide, 3rd ed., p. 86.)

Rent Restrictions Acts—increases of rent on account of increased rates—rent below standard rent—no notices of increase served—tenancy held to remain contractual.—In *Mills* v. *Bryce*, [1951] 1 All E. R. 111, the Court of Appeal dealt with a point of some difficulty under the Rent Acts. The question was whether a tenancy had remained contractual or had become statutory before the death of a tenant; this was material in determining a claim by the tenant's daughter for protection under section 12 (1) (*g*) of the 1920 Act. The dwelling-house had originally been let at a rent exclusive of rates. Later the landlord undertook the payment of rates and the rent was raised but not by as much as the amount of the rates then payable. Subsequent increases of rent on account of increased rates were required by the landlord and accepted by the tenant, but the rent was never raised to a figure equal to the standard rent, when regard was had to the amount of the rates. No notices of increase were ever served. It was held that the tenancy remained contractual. As despite the increases the rent always remained below the standard rent, notices of increase under section 3 (2) of the 1920 Act were not required. The tenant must be deemed to have agreed to the various increases of rent by way of variations in the terms of his

contractual tenancy. This decision is in line with *Phillips* v. *Copping*, [1935] 1 K. B. 15.

(Rent Restrictions Guide, 3rd ed., pp. 52, 58, 64.)

Landlord and Tenant Act, 1927—*section* 5 (2)—*meaning of "within two months after service of notice"*.—The Court of Appeal, in *Kerridge* v. *Lamdin*, [1950] 2 All E. R. 1110, have given what to most lawyers must appear the only possible interpretation of the words "within two months after the service of the notice" in section 5 (2) of the Landlord and Tenant Act, 1927, namely, that they refer to the service of the notice to quit and not the service of the tenant's notice requiring a new lease. Had it not been for the contrary view expressed in so respectable a textbook as Cheshire's *Modern Real Property* (5th ed.), p. 175, the "geographical position" of the words, to use the expression of the Master of the Rolls, would appear to have rendered any other construction unarguable.

(Woodfall, 24th ed., p. 1079.)

Landlord and Tenant Act, 1927—*application for new lease—reasonableness—premises required by two out of three landlords*.—In *Weatherall & Co., Ltd.* v. *Stone*, [1950] 2 All E. R. 1209, the Court of Appeal allowed an appeal from a County Court Judge who, although he correctly applied section 5 (3) (*b*) (i) of the Landlord and Tenant Act, 1927, failed to take into account the overriding requirement of reasonableness in section 5 (2). The business premises belonged to three joint landlords, a mother and her two sons, both over eighteen, and they were required for occupation by the two sons but not the mother. It was clear from *McIntyre* v. *Hardcastle*, [1948] 2 K. B. 82, that as only two out of the three joint landlords required the premises for their own occupation, they could not resist the claim for a new lease by relying on section 5 (3) (*b*) (i). But section 5 (2) lays it down that the granting of a new tenancy must be in all the circumstances reasonable. Here, in view of the fact that two out of the three joint landlords required the premises for their business, that requirement was not fulfilled.

(Woodfall, 24th ed., p. 1079.)

Rent Restrictions Acts—Landlord and Tenant (Rent Control) Act, 1949—*scope of section* 9—*surrender of tenancy by tenant—sub-tenant not protected against landlord*.—*Shackleton* v. *Greenhalgh*, [1950] 2 All E. R. 1223, is an important decision on section 9 of the Landlord and Tenant (Rent Control) Act, 1949. The facts were briefly that a tenant of a rent-controlled dwelling sub-let a part unfurnished, the sub-tenant sharing the kitchen. The tenant vacated possession and the landlord claimed possession of the remainder of the dwelling from the sub-tenant, who relied on section 9. The Court

of Appeal held that the sub-tenant in these circumstances was not protected. Section 9 protects the tenant against the landlord where the tenant has sub-let on a sharing basis. It would, however, be illogical to hold that section 9 gave the sub-tenant a higher protection against the superior landlord than he had against his immediate landlord; his protection against the latter had been that given by section 7, which applies the 1946 Act to the contract. This decision, although justified by the wording of the Act, may possibly surprise some readers.

(Rent Restrictions Guide, 3rd ed., p. 29.)

Landlord and Tenant (Rent Control) Act, 1949—*jurisdiction of Tribunal—flat first rated at rateable value above Rent Acts limits—dwelling-house before conversion within Acts—no apportionment—determination quashed.*—In *R.* v. *Sidmouth Rent Tribunal, ex p. Sellek,* [1951] 1 All E. R. 107, the Divisional Court issued an order of *certiorari* to quash the determination of a Rent Tribunal which had reduced the rent of a flat. The flat had been formed as the result of the conversion into four self-contained flats of a dwelling-house (outside London) the rateable value of which was £70. The flat was first assessed separately at £80, although this was later reduced to £64. The Divisional Court held that the Tribunal had no jurisdiction, as the relevant rateable value, £80, took it outside the Rent Acts. There had been no apportionment by the county court under section 12 (3) of the 1920 Act of the rateable value of the whole dwelling-house. If an application had been made to the county court for such an apportionment, it might well have been found that the conversion into flats had created new entities and that apportionment was inappropriate. In any case, the fact was that no apportionment had been made by the only competent forum, namely, the county court.

(Rent Restrictions Guide, 3rd ed., pp. 49–50, 66.)

Nuisance from premises adjoining highway—landlord's liability—no covenants to repair—no express reservation of right to enter to repair—weekly tenancy.—In *Mint* v. *Good,* [1950] 2 All E. R. 1159, the landlord's liability for injuries caused by nuisance from premises adjoining a highway was carried a stage further. The tenancy was weekly and oral and there was no covenant by either party to repair. No express power was reserved for the landlord to enter to do repairs. The Court of Appeal, proceeding a step beyond *Heap* v. *Ind Coope & Allsopp, Ltd.,* [1940] 2 K. B. 476, held that the landlord was liable for injuries caused by the collapse of a wall separating the forecourt of the premises from the highway, on the ground that a right to enter to do repairs was to be implied, and that the landlord's liability must be the same whether an express or an implied power is reserved. It is most important to note that this case does not decide that there is any implied term that the landlord will repair (the headnote in the *All England Reports* is misleading) but only that in

the case of such weekly tenancies an implication of a power for the landlord to enter to carry out repairs is reasonable. Denning, L.J., bold as usual in his conception of a living and developing common law, doubted whether *Pretty* v. *Bickmore* (1873), L. R. 8 C. P. 401, was good law today in so far as it decided that a landlord could exempt himself from liability to passers-by by taking a covenant from his tenant to repair the structure adjoining the highway.

(Woodfall, 24th ed., p. 814, and Supplement No. 5, p. 102.)

Agricultural Holdings Act, 1948—*notices to quit served on executors—death of tenant intestate—validity of notices.*—In two recent cases heard at Assizes, an important point in regard to the validity of a notice to quit has been decided. These cases are *Grey-Egerton* v. *Rutter and another* and *Earl of Harrowby* v. *Snelson and another,* reported at [1951] 1 T. L. R. 58 and [1951] 1 All E. R. 140, respectively. In both cases a notice to quit had been served on executors after the death of the tenant of a farm, the landlords having in mind section 24 (2) (*g*) of the Agricultural Holdings Act, 1948, which enables a notice to quit to be given within three months of the death of a tenant without rendering the landlord liable to be defeated by a counter-notice requiring the Minister of Agriculture's consent or to pay compensation for disturbance. In both cases the fact was that the tenant had died intestate, so that the notice should strictly have been served in the interval before the grant of administration on the President of the Probate, Divorce and Admiralty Division. In both cases, however, the notices were upheld, by Lord Goddard, C.J., and Cassels, J., respectively. The grounds of the decisions are perhaps not free from difficulty and obscurity, but there is little doubt of their substantial justice.

(Jackson's Agricultural Holdings, 10th ed., p. 138.)

Rent tribunals—Landlord and Tenant (Rent Control) Act, 1949, *and Furnished Houses (Rent Control) Act,* 1946—*meaning of "premium"—jurisdiction.*—Some recent decisions on the jurisdiction of Rent Tribunals are worth noting. *R.* v. *Hampstead and St. Pancras Rent Tribunal, ex p. Goodman,* [1951] 1 All E. R. 170, decided that a Rent Tribunal, acting under the Landlord and Tenant (Rent Control) Act, 1949, had no jurisdiction to proceed with a hearing where the applicant had withdrawn his application. Lord Goddard, C.J., expressed the view that an application could be withdrawn at any time before the Tribunal gives its decision. *R.* v. *City of London, etc., Rent Tribunal, ex p. Honig,* [1951] 1 All E. R. 195, decided that a Tribunal, acting under the Furnished Houses (Rent Control) Act, 1946, had jurisdiction to inquire whether a notice to quit was good or bad, in order to determine whether there was a subsisting contract of tenancy at the date of the reference, without which the Tribunal would have had no jurisdiction under the Act. The Tribunal's decision on this "collateral question" was, however, one which could be reviewed by means of *certiorari,* since, in order that the Tribunal may have jurisdiction, it is necessary that there

should *be* a subsisting contract, not merely that there should *appear* to the Tribunal to be one: cf. *R.* v. *Fulham, etc., Rent Tribunal, ex p. Philippe,* [1950] 2 All E. R. 211, and *R.* v. *Barnet, etc., Rent Tribunal, ex p. Millman,* [1950] 2 K. B. 506. These latter cases made it clear that, in order to give Tribunals under the 1949 Act jurisdiction under the portions of the Act dealing with premiums, there must actually *be* a premium. These cases have been followed in *R.* v. *Birmingham (West) Rent Tribunal, ex p. Edgbaston Investment Trust, Ltd.,* [1951] 1 All E. R. 198, where it was further held that a "premium" means a sum payable to a landlord and not to a third person, even if the third party is a party to a transaction to which both the landlord and the tenant are parties. The matter would, of course, be different if the payment is made to discharge the landlord's liability to the third party; this would clearly be equivalent to a payment to the landlord.

(Rent Restrictions Guide, 3rd ed., pp. 66–77.)

Rent Restrictions Acts—exclusion of houses in respect of which a local authority is required to keep a Housing Revenue Account—scope of exclusion—application to sub-tenancies.—It was held in *Percy G. Moore, Ltd.* v. *Stretch,* [1951] 1 T. L. R. 66, that the exclusion from new control of houses in respect of which a local authority is required to keep a Housing Revenue Account (section 3 (2) (*c*) of the 1939 Act), takes the house and not merely the tenancy created by the local authority out of the Acts. Thus a sub-tenant of the local authority's tenant is not protected. The position is similar to that of sub-tenants of Crown tenants: see *Rudler* v. *Franks,* [1947] K. B. 530.

(Rent Restrictions Guide, 3rd ed., p. 13.)

Rent Restrictions Acts—1933 *Act, Sched. I* (*d*)*—meaning of "without the consent of the landlord"—contractual tenant—question of damages for failure to deliver up.—Regional Properties, Ltd.* v. *Frankenschwerth,* [1951] 1 All E. R. 178, is an interesting decision. It brings out three points: (1) "tenant" in paragraph (*d*) of the First Schedule to the 1933 Act certainly applies to contractual tenants, so far as assignments are construed, whether or not it would cover a purported assignment by a statutory tenant; (2) the words "without the consent of the landlord" are to be read, in accordance with the view taken in the Court of Session in *Dalrymple's Trustees* v. *Brown,* 1945 S. C. 190, in their ordinary sense and not subject to any qualification restricting their application to cases where the contract of tenancy requires the landlord's consent to an assignment; (3) the New Zealand case of *Keats* v. *Thompson,* [1939] N. Z. L. R. 30, cannot be relied on in this country as showing that the common law liability of the tenant in damages for failing to deliver up possession applies to tenants who remain in possession by virtue of the Acts.

(Rent Restrictions Guide, 3rd ed., p. 89.)

Rent Restrictions Acts—application to attornment clause in mortgage.—The decision of Danckwerts, J., referred to in these Notes for September, 1950 (p. 330), in *Portman Building Society* v. *Young*, [1950] 2 All E. R. 443, has been reversed by the Court of Appeal ([1951] 1 All E. R. 191), although the issue in the appeal had narrowed down to the question of costs. Danckwerts, J., holding that the Rent Restrictions Acts applied to the relationship between the mortgagor and mortgagee created by the attornment clause, had felt himself precluded by section 17 (2) of the 1920 Act from awarding the mortgagees costs, but made an order for possession on the ground that rent was in arrear. The Court of Appeal held that the mortgagees were entitled to costs. Whether or not the attornment clause had created a true tenancy, the clause enabled the mortgagees to determine the relationship at any time without previous notice. The issue of the summons claiming possession did so determine it, and there was nothing left upon which the Rent Acts could operate. The real relationship of the parties was that of mortgagor and mortgagee. It would be an absurdity to suppose that the artificial landlord and tenant relationship superimposed upon this by the attornment clause could persist after the determination of the "tenancy", so as to confer the rights or protection ordinarily given by the Acts.

(Woodfall, 24th ed., pp. 287–291.)

Rent Restrictions Acts—purchase of furniture by tenant during tenancy—effect.—It seems clear from *Stagg* v. *Brickett*, [1951] 1 All E. R. 152, that the dictum of Asquith, L.J., in *Welch* v. *Nagy*, [1949] 2 All E. R. 868, 871, that the purchase by the tenant of all the furniture during the currency of a furnished tenancy does not convert the tenancy into an unfurnished tenancy, goes somewhat too far. In *Stagg* v. *Brickett* itself it was held on the facts that such a purchase had not changed the character of the tenancy, but all the members of the Court appear to have agreed that fundamental changes, as distinct from mere fluctuations, may change the tenancy from a furnished to an unfurnished one and *vice versa*.

(Rent Restrictions Guide, 3rd ed., p. 113.)

Agricultural holding—Regulation 62 (4A)*—revocation of regulation—effect upon notice to quit given before revocation.*—*Boddington* v. *Wisson*, [1951] 1 All E. R. 166, is only of historical interest as regards Defence Regulation 62 (4A), but it decides a point of some general importance in connection with the revocation of statutory instruments which restrict the normal operation of notices to quit or similar documents. Defence Regulation 62 (4A) was revoked during the currency of a notice to quit which was affected by the regulation. Since *Re Kendrick's Agreement*, [1948] Ch. 430, and *Kestell* v. *Langmead*, [1950] 1 K. B. 233, it has been clear that the regulation in its later form only rendered a notice to quit to which it applied "null and void" in a somewhat Pickwickian sense, as the Minister

could give his consent to it (thereby making it fully valid and effective) at any time up to the date of its expiry. It was held, therefore, that the revocation of the regulation during the currency of the notice removed any taint of invalidity from it, and nothing in section 38 (2) of the Interpretation Act, 1889, affected this result.

(Supplement No. 5 to Woodfall, 24th ed., pp. 116–117.)

Agricultural holding—inclusion of some non-agricultural land—no severance under Agricultural Holdings Act, 1948.—The decision in *Howkins* v. *Jardine,* [1951] W. N. 6, seems to justify the doubt expressed in these Notes for December, 1950 (p. 400), in regard to the correctness of Tucker, L.J.'s *dicta* in *Dunn* v. *Fidoe,* [1950] 2 All E. R. 685, about the possibility of the severance of agricultural from non-agricultural land comprised in a contract of tenancy for the purposes of a notice to quit. For the definition of an agricultural holding contained in section 1 (1) of the Agricultural Holdings Act, 1948, to apply, the tenancy must be in substance a tenancy of agricultural land. It may comprise some non-agricultural land, but the non-agricultural land cannot be severed from the agricultural land for the purpose of applying the special provisions in regard to notices to quit contained in the Agricultural Holdings Act, 1948. If the tenancy is in substance one of agricultural land, these provisions apply to the whole subject of the tenancy.

(Jackson's Agricultural Holdings, 10th ed., pp. 4–5.)

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5. *REVENUE CASES*

By Desmond Miller, Barrister-at-Law

Note:—Where a case is not reported in any of the general series of law reports it is cited from the *Annotated Tax Cases* (A. T. C.) or *Taxation Reports* (T. R.).

(a) Income Tax

Jaworski v. *Institution of Polish Engineers in Great Britain, Ltd.,* [1950] 2 All E. R. 1191 (C. A.).

(1) *Statutory provisions*: Rule 23 (2), All Schedules Rules, the Income Tax Act, 1918.

(2) *Point*: The importance of this decision lies in the views of the Court expressed *obiter*; first, that profits of employment assessable under Schedule E are not annual payments within Rule 23 (2) of the All Schedules Rules, and, secondly, that the Rule can only be applied where the deduction is permissive.

(3) *Facts and Decision*: The plaintiff was employed under the terms of an agreement in writing which provided that his remuneration

should be £x per month "without any deductions and taxes, which will be borne by the association".

It was conceded that the employment fell within the provisions of the Income Tax (Employments) Act, 1943, and pursuant to section 1 (1), *ibid.*, the defendants had deducted income tax on payment of the remuneration. The plaintiff claimed that the agreement, on its true construction, provided for the payment to him of such remuneration as after the appropriate deductions were made should leave the sum of £x; the action was brought to recover the amounts so deducted by way of tax:

Held, the agreement on its proper construction provided for payment of the net remuneration (of £x) together with such sum as might be necessary to leave that amount available after deduction of tax appropriate to the plaintiff's personal circumstances; accordingly the agreement was not invalidated by Rule 23 (2), *supra.*

Animal Defence and Anti-Vivisection Society v. *C. I. R.*, 29 A. T. C. 155 (Ch. D.).

(1) *Statutory provisions*: Section 37, the Income Tax Act, 1918.

(2) *Point*: One of the society's main objects necessarily involved the promotion or support of legislation prohibiting vivisection; in accordance with the decision of the House of Lords in *C. I. R.* v. *National Anti-Vivisection Society,* 28 T. C. 311, this was not a charitable purpose.

Goodwin v. *Brewster,* [1950] W. N. 587; [1950] T. R. 329 (Ch. D.).

(1) *Statutory provisions*: Rules 1 and 6 of Schedule E, the Income Tax Act, 1918; section 18, the Finance Act, 1922.

(2) *Point*: Purely a decision on its facts. *McMillan* v. *Guest,* 24 T. C. 190, applied.

(3) *Facts and Decision*: The appellant was director and managing director of a British company, of which the effective control was situate in London; his non-residence during the material period was established, and the sole point at issue therefore was whether the appellant, as managing director, held or exercised an office of profit in the United Kingdom:

Held, that there were two separate offices, but as the management of the company was committed to the managing director by virtue of contract, and, as that management was exercisable (and in contemplation of law exercised) in London, the profits were assessable under Schedule E, *supra.*

(The case is under appeal.)

Howson v. *Monsell,* [1950] 2 All E. R. 1239; [1950] T. R. 333 (Ch. D.).

(1) *Statutory provisions*: Case II of Schedule D, the Income Tax Act, 1918.

(2) *Point*: Lump sums received by an authoress for the sale of film rights over works in which she possessed the copyright were assessable as profits of her vocation: *Nethersole* v. *Withers,* 28 T. C. 501, distinguished.

(The case is under appeal.)

Roskams v. *Bennett,* [1950] T. R. 343 (Ch. D.).

(1) *Statutory provisions*: Rules 1 and 9 of Schedule E, the Income Tax Act, 1918; section 18, the Finance Act, 1922.

(2) *Point*: Another decision which serves to illustrate the narrow and rigid bounds of Rule 9 of Schedule E.

(3) *Facts and Decision*: It was established that the appellant had necessarily to perform duties of his employment, as district manager of an insurance company, at his home. As he maintained an office in his dwelling-house it was essential to set aside a separate room in which his children, of school age, could do their homework—the claim related to the expense of heating and lighting the room for the children, and was disallowed.

Davies v. *The Shell Company of China, Ltd.,* [1950] T. R. 345 (Ch. D.).

(1) *Statutory provisions*: Case I of Schedule D, the Income Tax Act, 1918.

(2) *Point*: The case turned on the distinction between fixed and circulating capital; in this connection Danckwerts, J., placed considerable reliance on the judgment of Romer, L.J., in *Golden Horse Shoe (New), Ltd.* v. *Thurgood,* 18 T. C. 280.

(3) *Facts and Decision*: The respondents, whose trade consisted in the sale and distribution of petroleum products in China, were an English company having its control in this country.

Agents were employed by the company in China upon the terms:

(a) that the petroleum was consigned to the agents;

(b) that the agent was not required to pay before sale for the products so consigned;

(c) that the agent was required to deposit a sum, in Chinese dollars, by way of security against his default.

The deposit was made with the company and the sum so deposited was to be returned at the termination of the agent's employment; subject to this consideration the company was entitled to use these sums in any way it chose.

In fact, amounts equivalent to the deposits were placed to the credit of the company's account with Shanghai banks until 1938, when

the account was transferred to England, as to the deposits, becoming sterling deposits.

Thereafter, these sums were placed on deposit with the respondents' parent company (in England) until 1941, when the respondents ceased their trading operations in China. Thereupon, the amounts due to the agents had to be and were repaid in Chinese dollars, but by reason of the fall in the value of this currency, in terms of sterling, there accrued to the respondents on this transaction a profit of some £229,475.

The Crown claimed that this sum was a profit of the respondents' trade and laid assessment under Case I of Schedule D. On appeal, the Special Commissioners found that the profit on exchange was a capital profit:

Held, dismissing the Crown's appeal, that the question was one of fact, and there were no grounds which would justify interference with the Commissioners' finding.

(The case is under appeal.)

(b) SUR-TAX

Potts' Executors v. *C. I. R.*, [1951] All E. R. 76 (H. L.).

(1) *Statutory provisions*: Sections 40 and 41, the Finance Act, 1938.

(2) *Point*: The effect of the House of Lords' majority decision on the construction of section 40, *supra,* may be stated as follows:

(a) the words "directly or indirectly" which qualify the word "paid" in subsection (1) are to be read into subsection (3);

(b) the result of so doing is to bring within the mischief of the section sums paid indirectly to a settlor by a "body corporate connected with the Settlement";

(c) where such a payment is made to someone other than the settlor, *i.e.,* is indirect, the person to whom the payment is made must—to fall within the section—be accountable to the settlor.

(3) *Facts and Decision*: The trustees of a voluntary settlement dated March, 1939, invested the settled funds in the purchase from the settlor (or his nominees) of the whole issued share capital of a prosperous private company of which the settlor was at all material times governing director.

For many years the settlor had in effect a current account with the company; in that account he was credited with his salary and expenses allowance, and debited with numerous payments to third parties which the company made at his request, *e.g.,* income tax and sur-tax.

This arrangement was continued subsequent to the execution of the settlement, and the account was considerably in debit in respect of the years 1939, 1940. The settlor discharged this debit by payment to the company, in December, 1940, but as the payments made on his behalf exceeded the income arising under the settlement which was in fact distributed, assessment was made on the

settlor's executors to the extent of the "available income" for the fiscal years 1940 and 1941.

It was conceded that the company was "a body corporate connected with the Settlement":

Held (Lord Morton of Henryton diss.), the question whether payments made by the company to third parties at the settlor's request were made by way of loan to the settlor within section 40 (5) (*a*) (i), *supra*, was one of fact. On the facts the House decided there was no loan to the settlor.

(c) Estate Duty

Re Smith's Settlement Trusts; *Executor Trustee and Agency Company of South Australia, Ltd.* v. *C. I. R.*, [1951] 1 All E. R. 146; [1950] T. R. 335 (Ch. D.).

(1) *Statutory provisions*: Section 47, the Finance (No. 2) Act, 1915; section 22 (1), the Finance (No. 2) Act, 1931.

(2) *Point*: In the case of settled property passing on the death of a tenant for life, the material residence and/or domicile upon which exemption depends is that of the person next entitled under the limitations of trust; in *Re Demarest's Settlement Trusts*, [1950] 1 Ch. 661, distinguished. This decision is at variance with the subsisting official practice, cf. *Green's Death Duties* (2nd ed.), p. 632.

(3) *Facts and Decision*: On the death of a tenant for life of settled property comprising (*inter alia*) securities issued subject to the condition of exemption contained in section 47, the Finance (No. 2) Act, 1915, and section 22 (1), the Finance (No. 2) Act, 1931, it was established:

(a) that the tenant for life died domiciled and ordinarily resident in the United Kingdom; and

(b) that under the limitations of trust, the settled property passed on the life tenant's death to persons domiciled and ordinarily resident in Australia.

The Crown claimed estate duty on the grounds that the exemption only applied where the person on whose death the exempt securities passed was not domiciled or ordinarily resident in this country at the date of his death:

Held, that the ownership of the tenant for life could not be the test of exemption as it was his death which occasioned the passing and *ex hypothesi* the claim for estate duty. In consequence, the beneficial ownership at the time the claim for duty arose lay with the remaindermen and as those persons were neither domiciled nor ordinarily resident in the United Kingdom, the conditions of exemption were satisfied.

(The case is under appeal.)

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The Elements of Drafting. By E. L. Piesse, a Solicitor of the Supreme Court of Victoria, and J. Gilchrist Smith, LL.M., a Solicitor of the Supreme Court (Hons.). London: Stevens & Sons, Ltd. xvi and 123 and (index) 9 pp. (10s. net.)

This monograph derives from a series of articles on the elements of drafting by the Australian author which appeared in the *Law Institute Journal of Melbourne* in 1941. The favourable reception of them lead to the publication of the work in book form in 1946 in Australia and it was suggested that an English edition with the substitution of some English cases for some of the Australian and the addition of some practical points for consideration peculiar to English law might serve a useful purpose. In this enterprise the Australian author was joined by Mr. J. Gilchrist Smith, whose editing of *Emmet on Title* has deservedly won much general appreciation. It is claimed that this work is the first to be published in England. If the statement is limited to the term "book" that is unquestionably the fact, but, as the Bibliography on p. xv would indicate, it is by no means the first treatment of the subject by writers of distinction in this country. In point of fact the authors make frequent use of an Extract from a Memorandum in the Report of the Poor Law Commissioners on Local Taxation entitled, "On Legislative Expression" by George Coode and issued as a House of Commons Paper, 1843, Vol. XX. The late Sir Howard Elphinstone in his invaluable *Introduction to Conveyancing* observed (6th ed., p. 29): "The common forms used by conveyancers are public documents. They have been brought into their present shape by the efforts of generations of conveyancers and while they have been modified from time to time in consequence of changes in the law, they remain substantially what they were many years ago. It follows that where a draftsman wishes to express a meaning which can be expressed by a common form, he should always employ it, for all lawyers will put a correct interpretation on his language without hesitation, while, if he endeavours to express the same meaning in a different form of words, he raises a presumption against the meaning, owing to his employment of unusual language, and he causes an unnecessary expenditure of time and labour to the person using the draft. . . . The author strongly advises the student to study the common forms very carefully . . . and the reasons which have led conveyancers to choose the words in which they are generally expressed". No doubt the exuberance of language in which an earlier generation of conveyancers indulged amounted at times to verbosity and those who recall or have recourse to *Williams on Real Property* will have noted at least some of the courses which led thereto. But colloquialism can be overdone, and it does seem to the present writer that the authors are somewhat unduly inclined to estimate the worth of style in draftsmanship on the footing of intelligibility to the layman. The book goes beyond the sphere of conveyancing, for drafting and conveyancing are not equivalents and some of the advice tendered appears more appropriately addressed to the Parliamentary Draftsman or his *alter ego* in the less exalted sphere of the subordinate legislation of municipal or other corporate entities, as also to draftsmen beyond the strict realm of "pure conveyancing". So far as the conveyancer is concerned his object must be the fulfilment of the wishes of his clients if and when they are capable of fulfilment. Most lay clients cannot appreciate at first sight the provisos in clauses to avoid

being caught by the Rule against Perpetuities. The present writer when on vacation was asked by a layman how the descendants of His late Majesty King George V were concerned with a Deed of Family Arrangement. If intelligibility on the part of the layman was to be the criterion, well might a doctor be concerned at elucidating the component parts of a prescription to his patient. But the book serves a very salutary purpose in that it directs the reader's attention to the importance of the "expression" of the law as contrasted with its "substance". It is eminently readable and on a smaller scale may be regarded as a kind of legal counterpart to *Fowler's Modern English Usage*. Particularly useful seem to be the chapters on "Problems of 'and' and 'or'", "Aids to clearness and accuracy" and "Expressions relating to time". Indeed, the merit of the work in no slight degree is to be found in suggesting the existence of difficulties which those coming to the practice of law afresh might easily overlook and "reminders to conveyancers" is a trite enough phrase to show that even the draftsman of many years may profit by the distant signal of danger, for that way safety lies.

BERTRAM B. BENAS.

Gale on Easements. Twelfth edition. By D. H. McMULLEN, M.A., Barrister-at-Law. London: Sweet & Maxwell, Ltd. xxxiv and 589 pp. (£3 10s. net.)

This new edition of a standard work is all the more welcome in that, through no fault of the learned editor or of the publishers, the book has at last appeared after a longer interval since the publication of the previous edition than has occurred previously in the long and distinguished career of the work. The present editor is to be complimented in having produced an accurate and useful edition which maintains the distinctive style and layout of previous editions but includes necessary changes in the text in order to keep up with recent developments in the law. On the more controversial points, Mr. McMullen has, rightly if we may say so, ventured to express his own opinions rather than slavishly repeat those of his predecessors in title.

Thus, he has accepted the view that the list of easements recognised by English law is not closed; but surely this was not so "bold" a conclusion as the learned editor seems to suggest? It seems to us to be the only possible view, especially when the heterogeneous list of recognised easements (see p. 30 of the present edition) is considered; and the Australian Courts would, apparently, add to this list a right to transmit noise over the dominant tenement, such as will be heard on the servient tenement (see *Re State Electricity Commission of Victoria and Joshua's Contract* (1940), 46 A. L. R. 105). We are particularly pleased to see a reasonably full treatment of the difficult subject of equitable easements, and of their position in connection with registered land (see p. 70).

Among the cases which have been decided since the last edition was published, we are surprised to see no mention of *Marshall* v. *Blackpool Corporation*, [1935] A. C. 16; this could have been cited on p. 307 as an authority for the proposition that a landowner has a common law right of access to the highway from his land at any point, and that this can be taken away by statute only in the clearest possible terms (as, *e.g.*, was provided for in the Restriction of Ribbon Development Act, 1935, and now extended by the Town and Country Planning Act, 1947). *Apostal* v. *Simons*, [1936] 1 All E. R. 207, could have been noted on p. 408, as showing that where s. 38 of the Law of Property Act, 1925, applies, a plaintiff may recover in respect of the removal of support only as regards the moiety of the wall vested in him. When dealing with the natural right of support to land (p. 335 *et seq.*), the learned editor has not dealt with the important case of *Rouse* v. *Gravelworks Ltd.*, [1940] 1 K. B. 489, which

seems to establish the principle that a servient owner is not to be held responsible for the letting down of the surface of his neighbour's land, where he has made only a "natural" user of the servient tenement—the case, it is submitted, is in line with previous precedent on the point, but is a clearer authority than some of the earlier cases cited by the learned editor.

The somewhat unexpected decision of *Re Webb*, [1950] 2 All E. R. 828, had not, of course, been decided in time to be noted in the present edition, and the learned editor has, naturally enough, not included mention of the earlier somewhat similar case of *Simpson* v. *Weber* (1925), 133 L. T. 46. These two cases (unless *Re Webb* is to be confined to the field of landlord and tenant) seem to establish the proposition that an easement will be reserved in favour of the grantor on a conveyance of the quasi-servient tenement where it was clearly the intention of the parties (by implication from the facts) that the circumstances in existence at the time of the conveyance should be taken into account, and continued in effect. This principle does not seem to fit into any one of Greer, L.J.'s (in *Aldridge* v. *Wright*, [1929] 2 K. B. 117—see p. 151 of the present work) exceptions to the rule in *Wheeldon* v. *Burrows* (1879), 12 Ch. D. 31, but rather a reversion, at least in part, to *Pyer* v. *Carter* (1857), 1 H. & N. 916 (see p. 146), which Mr. McMullen has very severely criticised (with every justification, in our humble opinion). It will be most interesting to see whether the principle of *Re Webb* will be followed in later cases; unfortunately the point is not one which is likely to be raised frequently.

The other important cases on easements in recent years—*Todrick* v. *Western National*, [1934] Ch. 190, *Winter Garden Theatre* v. *Millennium Productions*, [1948] A. C. 173, and the recent cases on the operation of section 62 of the Law of Property Act, 1925 (*Wright* v. *Macadam*, [1949] 2 K. B. 744, and *Goldberg* v. *Edwards*, [1950] 1 Ch. 247), and many others, seem to be adequately dealt with in their appropriate places. We are somewhat surprised however, that the many changes in the English law of real property brought about by recent legislation have not been more fully discussed. Thus, only one reference appears in the Table of Statutes to the Town and Country Planning Act, 1947; to take but one example of the manner in which this statute may affect this branch of the law, it may be necessary to decide whether such a change in the use of an easement as was intended in *Todrick* v. *Western National* (*supra*), amounts to devlopment for which express planning permission may be necessary. One of the most important methods by which private rights of way may be extinguished by statute at the present time is under section 24 of the Town and Country Planning Act, 1944, as re-enacted in the Eleventh Schedule to the Act of 1947, but this is not discussed in the paragraph "Of the Extinguishment of Easements by Statute" (see p. 456 *et seq.*).

As a matter of personal preference, we would have welcomed the extensive pruning of many of the *verbatim* quotations from the Digest of Justinian, and other Civil Law sources. Historically, it is clear that the English law of easements owes a very great deal to these sources, but as a matter of practice, we doubt whether many solicitors (or counsel) having occasion to consult this work would derive any real benefit from these Latin extracts. The academic lawyer and the expert in comparative law delight in such matters, but we feel sure that Mr. McMullen is writing, as was Mr. Gale in 1839, primarily for "the Profession". For similar reasons, we would have welcomed the inclusion of full references in the Table of Cases; unfortunately even in the text, reference to one set of Reports only has been included.

In spite of our comments, which we offer with some trepidation to one so obviously immersed in his subject as Mr. McMullen, we feel that this is an excellent publication—we have yet to meet the "perfect" law book—and that it will worthily uphold the prestige of previous editions. Of the print and format we need say no more to our readers than to observe that it is of the publisher's best.

J. F. G.

A Guide to Land Registry Practice. Sixth Edition. By John J. Wontner. London: The Solicitors' Law Stationery Society, Ltd. 1951. (21s.)

The fact that this little book has run into six editions, one of which has been twice reprinted, since 1928 is sufficient evidence that it is found useful in practice. The Preface states that all major changes in Land Registry practice have been noted (presumably since 1943 the date of the last edition) and there is no doubt that practitioners can find this volume extremely useful on the practice of the Registry. It may be noted that the author appears to accept the views of the Registry on all the matters of practice when there is room for divergence of opinion, but in a book of this character that is probably a good thing. In our view, however, this renders the chapter (two pages) on the Town and Country Planning Act nearly useless from a conveyancing point of view. The official view is that the Town and Country Planning Act, 1947, does not affect registered land so far as the Register is concerned; except and so far as it gives rise to land charges other than local land charges to which no reference is made. The author explains that a transfer is filed and hence he says any additions will be lost to the person making them. He points out that this does not apply in the case of leases and mortgages but says that the statutory form of charge is similarly filed. This view is based on L. R. R. 290 (the book refers to L. R. R. 287) which purports to give the Registrar a discretion to refuse to produce instruments not referred to on the Register. Even if this rule is valid and does not contravene the spirit if not the letter of section 112 of the Act (which we think it does if applied to registered transfers) it is incorrect to say (at p. 50), "a document can be inspected *only* if it is referred to on the register", because at least the Registrar has a discretion to produce it and in our experience has never refused to do so if required in the course of investigation of title. So far as statutory forms of charge are concerned there should be even less reason for the practice of filing them away without inclusion in the Charge Certificate because in almost all cases the statutory form requires additional covenants irrespective of the Town and Country Planning Act, such as covenants to insure, and it is thought that if the author is correct in his statement this only provides another reason for never using the statutory form of charge. But there is the further point that to suggest, as the author does, that practitioners *must* depend for evidence of "user" (presumably he means "use") upon contracts, requisitions, etc., is misleading. There is nothing to prevent the practitioner from having the transfer executed in duplicate and it is a deed just as much as any other title deed. It is also much easier to keep such a document with the Land Certificate, because in our experience this does not happen to contracts, requisitions, etc. Furthermore, in the event of dispute we gravely doubt whether the Registrar would ever refuse on subpœna to produce a registered transfer (see *Brickdale,* 4th ed., p. 456) even if he has power to do so. Consequently, even a duplicate may not be regarded as necessary as long as a sufficient copy is kept. Of course these views are all dependent upon the Registrar not refusing to accept a transfer on the ground that it departs too far from the prescribed form. We believe that so far he has not done this and we respectfully suggest that if he does not wish to add to the complication of registered conveyancing he will not do so. We fail to see why he should wish to force parties to have two instruments instead of one.

But this is our essential criticism of the book. It contains a considerable number of printed forms of the type that can be purchased at a law stationers, but there is no real attempt to deal with the conveyancing side of Land Registry Practice. For example and as a simple point, the printed forms of transfer (except a transfer by a registered proprietor of a charge in exercise of his statutory power of sale) contain the words "as beneficial

owner" to imply covenants for title. The printed form of charge contains no such words; no reason is given and, indeed, we can think of none, any more than we can see why the words "as mortgagee" are omitted from the transfer by a mortgagee, though in fact this is the more understandable owing to the qualification of the mortgagee's covenant.

Our point in devoting so much attention to one or two small matters is not to decry the merits of this admirable practice book but to indicate that it should not be taken to include conveyancing and that on this aspect the practitioner needs much more guidance.

Wards of Court and Guardianship Proceedings in the High Court. By F. G. R. JORDAN, Solicitor. Oyez Practice Notes. London: The Solicitors' Law Stationery Society, Ltd. 20 pp. 1951. (2s. 6d.)

This is one of a valuable series of practice notes. The occasion of its issue is the change in practice introduced by the Law Reform (Miscellaneous Provisions) Act, 1949, s. 9, in the practice necessary to make a person a ward of Court: now see R. S. C., Ord. LIV*r*. The essential point is that this new procedure will get rid of the old rather cumbrous procedure of paying into Court, etc., that was sometimes used, for instance, to oust the jurisdiction of the magistrates to give consent to a marriage. This is a particularly clear account of the proceedings and effect in relation to wardship and guardianship in the High Court and can be highly recommended.